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80-1509
No. .....

In The
Supreme Court of the United States
October Term, 1980

WOMENS SERVICES, P.C., et al.,
Appellees,

vs.

CHARLES THONE, Governor of the State of Nebraska, et al.,
Appellants.

LADIES CENTER, NEBRASKA, INC., et al.,
Appellees,

vs.

CHARLES THONE, Governor of the State of Nebraska, et al.,
Appellants.

WOMENS SERVICES, P.C., et al.,
Appellees,

vs.

CHARLES THONE, Governor of the State of Nebraska, et al.,
Appellants.

On Appeal from the United States Court of Appeals for the Eighth Circuit

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether state legislation regulating the performance of abortions during the first trimester is in all instances subject to strict scrutiny under a substantive due process analysis.

2. Whether the record supports a finding that the challenged statutes unduly burden the right to seek an abortion.

3. Whether it is constitutionally permissible for a state to require by regulation that every minor who seeks the performance of an abortion affirm in writing to her physician that she has consulted with her parents.

4. Whether criminal accomplice liability creates direct threat of personal detriment and therefore gives rise to standing.

5. Whether the trial court erred in declining to abstain.

LIST OF PARTIES

The names of the parties to the action below are set out as follows:

Appellants, Charles Thone, Governor of the State of Nebraska; Paul L. Douglas, Attorney General for the State of Nebraska; Donald L. Knowles, County Attorney for County of Douglas, State of Nebraska;

Intervenor, Marilyn A. Schneider;

Appellees, Womens Services, P.C., a Nebraska Corporation; William G. Orr, M.D.; Ladies Center, Nebraska, Inc., a corporation; John M. Epp, M.D., Betty Roe, by her next friend, Barbara Gaither; and Elizabeth F.

TABLE OF CONTENTS

Pages

Questions Presented for Review i

List of Parties i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions 3

Statement of the Case 4

The Questions are Substantial 8

Argument:

I. This appeal raises an important and recurring issue regarding the proper legal standard of review to be used by federal courts in judging the constitutionality of state statutes regulating the performance of abortions. 8

II. The factual finding by the trial court that a portion of the informed consent statute, Neb. Rev. Stat. § 28-326 (8) (a) and the forty-eight hour waiting period created "an undue burden" was unsupported by the record. 14

III. The parental consultation statute, Neb. Rev. Stat. § 28-333 (Reissue 1979), does not violate a minor's abortion liberty right. 16

IV. A party who faces potential criminal liability under a general criminal accomplice statute has

TABLE OF CONTENTS—Continued

Pages

no direct threat of personal detriment sufficient to maintain standing in an action challenging the constitutionality of a state statute. 17

V. The trial court erred in declining to abstain from ruling on Neb. Rev. Stat. § 28-326 (8) (a) (Reissue 1979). 18

Conclusion 20

TABLE OF AUTHORITIES

CASES:

Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172 (N. D. Ohio 1979) (On Appeal to Sixth Circuit Court of Appeals) 10, 13

Anderson v. Tiemann, 182 Neb. 393, 155 N. W. 2d 322 (1967) 20

Baker v. Carr, 369 U. S. 186 (1962) 17

Bellotti v. Baird, 428 U. S. 132 (1976) 9, 11, 13, 20

Charles v. Carey, 627 F. 2d 772 (7th Cir. 1980) 8, 10, 11, 13

Charles v. Carey, Nos. 79-C-4541 and 4558 T. I. opinion Nov. 16, 1979 (U. S. D. C. N. D. Ill.) 10, 13

Doe v. Bolton, 410 U. S. 179 (1973) 17

Harris v. McRae, — U. S. —, 65 L. Ed. 2d 784, 100 S. Ct. — (1980) 14

TABLE OF AUTHORITIES—Continued

Pages

H. L. v. Matheson, 604 P. 2d 907 (Utah 1978), currently docketed U. S. Sup. Ct. No. 79-5903 ..... 16, 17

Leigh v. Olson, No. A3-79-78 (D. N. D.) 13

Maher v. Roe, 432 U. S. 464 (1977) 9, 13

Margaret S. v. Edwards, 488 F. Supp. 1981 (1980) 13

Munson v. Henry, No. Civ. 80-3043 (Cent. Div. S. D.) ... 13

Planned Parenthood Association v. Fitzpatrick, 401 F. Supp. 554 (E. D. Pa. 1975) 14

Planned Parenthood Association of Kansas City v. Ashcroft, 483 F. Supp. 679 (1980) (on appeal to Eighth Circuit Court of Appeals) 13

Planned Parenthood of Central Missouri v. Danforth, 428 U. S. 52 (1967) 9, 10, 13, 20

Planned Parenthood v. Blanton, No. 78-2310 (W. D. Tenn. 1979) 10, 13

Planned Parenthood League of Massachusetts, et al. v. Francis Bellotti, No. 80-1580 Slip op. (2nd Cir.) 2/9/81 ..... 10, 13

Roe v. Wade, 410 U. S. 164 (1973) 11, 12, 13, 14

Wolfe v. Schroering, 541 F. 2d 523 (6th Cir. 1976) 10

Womens Community Health Center, Inc. v. Cohen, 477 F. Supp. 542 (D. Me. 1979) 13

Womens Services, P.C. v. Thone, 483 F. Supp. 1022 (D. Neb. 1979) 11, 16

TABLE OF AUTHORITIES—Continued

Pages

CONSTITUTIONAL PROVISIONS:

United States Constitution, Article III, Section 2 ..... 3, 17

United States Constitution, XIV Amendment, Section 1 3

FEDERAL STATUTES:

28 U. S. C. § 1254 (2) 2

42 U. S. C. § 1983 ..... 2, 18

42 U. S. C. § 1988 18

STATE STATUTES:

Neb. Rev. Stat. § 28-325, et seq. (Reissue 1979) 3

Neb. Rev. Stat. § 28-326 (7) (Reissue 1979) 8, 15

Neb. Rev. Stat. § 28-326 (8) (a) (Reissue 1979) 4, 5, 14, 18, 19

Neb. Rev. Stat. § 28-327 (Reissue 1979) 4, 5

Neb. Rev. Stat. § 28-333 (Reissue 1979) 2, 4, 16

Neb. Rev. Stat. § 28-343 (Reissue 1979) 5, 20

Ill. Senate Bill 47 (enacted 10/30/79) 12

Ky. Rev. Stat. § 436.023 12

La. Rev. Stat. Ann. § 40-1299.35.1, et seq. (West Supp. 1979) 12

22 Me. Rev. Stat. Ann. § 1598 12

Mass. Gen. Laws Ann. Ch. 112, § 12 (s) 12

TABLE OF AUTHORITIES—Continued

Pages

Mo. Rev. Stat. § 188.015, et seq. 12

N. D. Cent. Code, Ch. 14-02.1 12

S. D. Codified Laws § 34-23-A-10.1 (Supp. 1980) 12

Tenn. Code Ann Ch. 39-302 12

TEXT:

M. Wood & W. Cole, Jr., *Counseling, Consulting, and Consent: Abortion and the Doctor-Patient Relationship*, 1978 B. Y. U. L. Rev. 826-827 9

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of United States District Court Judge Warren K. Urbom is reported at 483 F. Supp. 1022 and appears as Appendix ("App.") A hereto. The opinion of Judge Warren K. Urbom issued August 1, 1979, which granted partial summary judgment declaring Neb. Rev.

Stat. § 28-333 (Reissue 1979) (parental consultation) unconstitutional is unreported and appears as App. B hereto. The Order of Judge Warren K. Urbom issued on August 9, 1979, which denied defendants' motion to dismiss based on the abstention doctrine is unreported and appears as App. C hereto.

The per curiam opinion of the Eighth Circuit Court of Appeals is unreported and appears as App. D hereto.

JURISDICTION

This is a civil rights action brought pursuant to 42 U. S. C. § 1983 which challenges the constitutionality of certain abortion control statutes enacted by the State of Nebraska. This appeal is taken from a final order of the Eighth Circuit Court of Appeals which held certain portions of those statutes to be invalid as repugnant to the Fourteenth Amendment of the Constitution of the United States.

The date of the decree by theEighth Circuit Court of Appeals was December 8, 1980. Appellants' notice of appeal was filed in the Eighth Circuit Court of Appeals on January 7, 1981 (App. G).

Jurisdiction is conferred upon this Court pursuant to 28 U. S. C. § 1254 (2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article III, Section 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies . . . between a State and Citizens of another State; —between Citizens of different States, . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

United States Constitution, Article XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Neb. Rev. Stat. § 28-325, et seq. (Reissue 1979).

The statutes cited above are lengthy; therefore, their pertinent text is set forth in App. E hereto.

STATEMENT OF THE CASE

These three consolidated cases are civil rights actions challenging certain abortion control statutes enacted by the State of Nebraska. *See,* App. E. At issue here are statutes which require: (1) that a woman seeking an abortion must affirm in writing that she has been advised of the reasonably possible medical and mental consequences of abortion, childbirth and pregnancy; (2) a waiting period of forty-eight hours following the execution of an informed consent document; (3) a statement signed by a minor seeking an abortion proclaiming that she has consulted with her parents; and (4) the reporting of prescribed abortions to the Nebraska Department of Health. Also at issue is the *standing* of the plaintiff abortion clinic. Ladies Center, Nebraska, Inc., and the application of the doctrine of *abstention* to the informed consent statute, Neb. Rev. Stat. § 28-326 (8) (a) (Reissue 1979).

On August 1, 1979, the court granted plaintiffs partial summary judgment with respect to parental consultation, Neb. Rev. Stat. § 28-333 (Reissue 1979). On August 9, 1979, the court entered a pretrial order in which it declined to abstain from ruling on the informed consent language of the challenged statute, Neb. Rev. Stat. § 28-326 (8) (a). After a full hearing on the remaining issues, the court entered a memorandum and order dated November 9, 1979, in which it held:

(1) That a subpart of the statutory definition of informed consent, Neb. Rev. Stat. § 28-326 (8) (a) was an unconstitutional abortion regulation.[1]

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1 Neb. Rev. Stat. § 28-327 prohibits the performance of an abortion in the absence of an "informed consent" which

(Continued on next page)

(2) That the forty-eight hour waiting period, Neb. Rev. Stat. § 28-327 was an unconstitutional abortion regulation.

(3) That Neb. Rev. Stat. § 28-343, as it pertained to "prescribed abortions" was an unconstitutional abortion regulation.

In a per curiam opinion issued December 8, 1980, the Eighth Circuit Court of Appeals affirmed the trial court's judgment in all respects and based its affirmance "primarily on the basis of the district court's decision." The Appeals Court added that because of intervening cases of the United States Supreme Court and "for other reasons" it would comment briefly on each aspect of the decision. *See*, App. D, at p. 67. The Appeals Court thereafter specifically held "that legislation which directly interferes with a woman's fundamental right to decide to terminate her pregnancy is subject to *strict scrutiny* under a substantive due process analysis." *See*, App. D, at p. 72. (Emphasis added.)

The opinions of the trial court, App. A, B, and C, and the Eighth Circuit Court of Appeals, App. D, clearly re-

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(Continued from previous page)

term is defined by Neb. Rev. Stat. § 28-326 (8) (a) and which states in relevant part:

> Informed consent shall mean a written statement, voluntarily entered into by the person upon whom an abortion is to be performed, whereby she specifically consents to such abortion. Such consent shall be deemed to be an informed consent only if it affirmatively appears in the written statement that the person upon whom the abortion is to be performed has been advised (a) of the reasonably possible medical and mental consequences resulting from an abortion, pregnancy, and childbirth, . . .

flect that the questions presented in this appeal were raised both at trial and on appeal.

Substantial testimony was presented at trial in regard to the manner of medical practice of the plaintiffs' abortion clinics and the medical complications of abortions performed at all stages of pregnancy. Included in this latter subject was expert testimony of Dr. Leslie Iffy, an internationally recognized physician, a specialist in the fields of both obstetrics and gynecology and neonatology, and the author of numerous scholarly articles on the subject of long term medical complications of induced abortions[2] (T1598:5-1602:1).[3] Dr. Iffy gave as his principal expert opinion that one single abortion performed during the first trimester closely doubles the rate of premature births in subsequent pregnancies (T1619:7-11). Dr. Iffy further testified that prematurity is the leading cause of death or physical and mental disability in children (T1622:12-25) and that each subsequent abortion relatively increases the risk of prematurity (T1619:7-11).

Appellants at trial also presented evidence that appellee Womens Services, P.C. engaged in virtually no

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2 Of additional note in regard to Dr. Iffy's qualifications and lack of any personal bias was his testimony which reflected his clinical experience of having performed numerous abortions during his twenty-five year plus medical career and the lack of any impeachment evidence that Dr. Iffy has ever expressed or shared in an opinion that abortion is morally wrong.

3 The transcript of trial testimony (T) is in the custody of the Clerk of the Eighth Circuit Court of Appeals. Appellants have not elected, pursuant to Supreme Court Rule 13, to certify the record to this Court since we do not deem it essential, but we do feel that reference to the record is necessary for a proper understanding of the case and its importance.

counseling of its abortion patients (T1033:4-1036:15), that physicians of both of appellees' abortion clinics often never saw the abortion patient until she was on the procedure table, that the clinics were performing abortions on an assembly line basis, and that there was no doctor-patient relationship established (T252:15-264:25; T1268:11-1273:21).

The evidentiary record below also disclosed that only in the most rare of occasions has a woman ever been provided an abortion by either of appellees' abortion clinics within forty-eight hours of her request for medical treatment. The testimony of abortion clinic personnel proved that for the vast majority of abortion clinic patients there was a delay of from seven to ten days between the time the abortion was first requested and its actual performance (T56:5-60:5; T306:16-25; T1024:9-1025:7).

Further testimony of Dr. Leslie Iffy on the issue of a forty-eight hour delay included his personal observation that during the twenty-five plus years he had performed abortions, he had never found it necessary to perform an abortion within forty-eight hours of the patient first having presented herself (T1726:12-20).

Appellees' expert witness, Dr. Christopher Tietze, an internationally recognized medical statistician, testified that a delay of forty-eight hours during the first trimester would be "clinically unimportant." When asked to define "clinically unimportant," Dr. Tietze stated, "I would draw no conclusion as to whether it was desirable to do it [abortion] earlier or to do it later." (T957:3-6).

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THE QUESTIONS ARE SUBSTANTIAL

ARGUMENT

I.

This appeal raises an important and recurring issue regarding the proper legal standard of review to be used by federal courts in judging the constitutionality of state statutes regulating the performance of abortions.

This appeal involves laws enacted by the State of Nebraska which have as their primary aim the protection of the decision making process of women who seek abortions. Succinctly described, they require (1) the signing of a written statement by the woman and her physician which affirms that she has been informed of certain medical information, and (2) the passing of forty-eight hours—unless there is "an emergency situation"[4]—before the abortion may be performed. In holding these laws unconstitutional the Eighth Circuit Court of Appeals clearly identified the legal standard of review used both by it and the trial court to test the constitutionality of the challenged statutes by stating, "We agree that legislation which directly interferes with a woman's fundamental right to decide whether to terminate her pregnancy is subject to strict scrutiny under a substantive due process analysis." App. D, at p. 72. The Eighth Circuit Court of Appeals cited as authority *Charles v. Carey*, 627 F. 2d 772 (7th Cir. 1980), which case more extensively discusses the conflict and controversy

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4 "Emergency situation" is defined within the statutes. *See*, Neb. Rev. Stat. § 28-326 (7) found at App. E at p. 76.

which has arisen over which legal standard of review is applicable to state legislation which attempts to expand upon the Supreme Court's stated approval of legislation which insures that the abortion decision "be made with full knowledge of its nature and consequences." *Planned Parenthood of Central Missouri v. Danforth*, 428 U. S. 52, 67 (1967). Those favoring a more detailed informed consent than that found in *Danforth* and the inclusion of a requirement for a waiting period to insure that the informed consent information can be carefully weighed by the woman[5] have advocated that reviewing courts impose upon those parties challenging such legislation the requirement of showing an "undue burden" on the abortion decision making process before the challenged laws are made subject to "strict scrutiny." Directly supporting this relaxed standard of review is the following language of this court:

> In *Planned Parenthood of Central Missouri v. Danforth* we today struck down a statute that created a parental veto. . . . At the same time, however, we held that a requirement of written consent on the part of a pregnant adult is not unconstitutional unless it unduly burdens the right to seek an abortion.

Bellotti v. Baird, 428 U. S. 132, 147 (1976). In similar language in *Maher v. Roe*, 432 U. S. 464, 473 (1977), this Court held:

> Although a state-created obstacle need not be absolute to be impermissible, . . . we have held that a re-

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5 The need for thorough counseling coupled with the waiting period is not only advocated by legislative bodies in this country but in Europe as well. *See*, M. Wood and W. Cole, Jr., *Counseling, Consulting, and Consent: Abortion and the Doctor-Patient Relationship*, 1978 B. Y. U. L. Rev. 826-827.

> quirement for a lawful abortion "is not unconstitutional unless it unduly burdens the right to seek an abortion." [Citations omitted.]

Id.

It is thus argued by those supporting statutes which in some manner regulate the performance of first trimester abortions that absent a showing of "undue burden" such regulations are permissible if related to a legitimate state interest. This legal standard of review was adopted by the Sixth Circuit in *Wolfe v. Schroering,* 541 F. 2d 523, 526 (1976), which case involved the challenged constitutionality of a twenty-four hour waiting period statute enacted by the State of Kentucky. The *Schroering* court clearly identified the legal standard adopted by it in the following language:

> The district court invalidated the waiting period requirement because "it attempts to regulate the abortion procedure during the first trimester during which time the state has no compelling interest and thus can pass no regulation affecting this period." *Danforth* [citation omitted] rejected similar reasoning.

Id. at 526. Other courts adopting the "rational basis" versus "strict scrutiny" standard in finding waiting periods constitutionally permissible have included *Akron Center for Reproductive Health, Inc. v. City of Akron,* 479 F. Supp 1172 (N. D. Ohio 1979); *Charles v. Carey,* Case Nos. 79-C-4541 and 79-C-4558, temporary injunction slip opinion, November 16, 1979 (U. S. D. C. N. D. Ill.) rev'd on appeal, *Charles v. Carey, supra;* and *Planned Parenthood v. Blanton,* Case No. 78-2310, slip opinion, August 31, 1979 (U. S. D. C. W. D. Tenn).

Those who oppose abortion regulation laws urge the adoption of the legal standard chosen by the Eighth Cir-

cuit Court of Appeals in the case at bar, the Seventh Circuit in *Charles v. Carey, supra,* and the Second Circuit in *Planned Parenthood League of Massachusetts, et al. v. Francis Bellotti,* No. 80-1580 (Slip Opinion issued February 9, 1981). They argue that any statutes which regulate first trimester abortions, carry criminal penalties, and impose any restrictions to the effectuation of the decision to abort must be supported by a compelling state interest. *Charles v. Carey, supra,* at 777, 778. The decision of the trial court in this action, which was accepted in its entirety by the Appeals Court, specifically addresses this issue by stating:

> Absent an emergency situation, the informed consent and waiting period requirements would stand between the woman's desiring an abortion and obtaining one. This is a direct obstacle to abortion.

Womens Services, P. C. v. Thone, 483 F. Supp. 1022, 1043 (D. Neb. 1979). In so holding the trial court recognized that considerable confusion and conflict existed as to the proper legal standard to be used in light of post-*Roe v. Wade* decisions, including specifically, *Bellotti v. Baird, supra,* which it admitted did possibly indicate "some retreat from the stiff no-interference-during-the-first trimester standard clearly adopted in *Roe v. Wade,* 410 U. S. 164." *Id.,* at 1043. The trial court then summarized its decision to select "the most rigorous standard" in judging the challenged statutes by stating:

> In any event it would take a clearer signal from the Supreme Court than that in *Bellotti v. Baird* to

> demonstrate a retreat from the strict standard announced in *Roe v. Wade* and its progeny.

Id. at 1043.

Once having adopted "the stiff no-interference-during-the-first-trimester standard" the trial court openly admitted that it would ignore "extensive evidence presented by the defendants on the subjects of (1) safety of first trimester abortions and (2) the lack of any true physician-patient relationship in the appellees' abortion clinics."[6] *Id.* at 1044.

Proof of a substantial federal question is further established in view of the passage by at least eight other states of laws imposing a more than bare bones informed consent requirement coupled with a twenty-four or forty-eight hour waiting period.[7] These attempts to enact legis-

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6 In explaining its decision to ignore certain evidence presented by plaintiffs below, the court explained:

> I make no findings of fact with respect to the greatest part of this evidence; that is not appropriate, it would seem, until the Supreme Court is ready to overrule *Roe v. Wade* or at least substantially limit it. I only make those findings of fact necessary to appraise this legislation pursuant to current constitutional standards. In this respect, it cannot be overemphasized that the challenged legislation does not differentiate with respect to trimesters of pregnancy. Thus, all of the legislation must be judged according to the most rigorous standard—that reserved for legislation touching upon the first trimester of pregnancy.

7 Those states enacting such legislation and the appropriate citation are: South Dakota, S. D. Codified Laws § 34-23A-10.1 (Supp. 1980), North Dakota, N. D. Cent. Code, Ch. 14-02.1, Illinois, Ill. Senate Bill 47, enacted October 30, 1979, Missouri, Mo. Rev. Stat. §§ 188.015, et seq., Louisiana, La. Rev. Stat. Ann. § 40-1299.35.1, et seq. (West Supp. 1979), Tennessee, Tenn. Code Ann. Ch. 39-302, Kentucky, Ky. Rev. Stat. § 436.023, Massachusetts, Mass. Gen Laws Ann. Ch. 112, § 12 (s), and Maine, 22 Me. Rev. Stat.Ann. §1598.

lation aimed at insuring that the abortion patient has an "awareness of the decision and its significance" (*Planned Parenthood of Central Missouri v. Danforth, supra,* 428 U. S. at 67) have caused in every instance litigation.[8]

We would respectfully submit to this Court that there is considerable confusion and conflict arising from this Court's initial statement in *Roe v. Wade* that: "For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician" (*Roe v. Wade,* 410 U. S. at 164) and language contained in subsequent decisions wherein state or federal laws regulating, directly or indirectly, the abortion decision making process have not been subjected to "strict scrutiny." *See, Bellotti v. Baird,* 428 U. S. 147 (parental notice); *Maher v. Roe,* 432 U. S. at 473 (public funding); *Planned Parenthood of Central Missouri v. Danforth,* 428

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8 While not certainly exhaustive, we here list litigation presently being conducted in federal courts wherein the principal issue is the appropriate legal standard to be applied to informed consent and waiting period legislation. *Munson v. Henry,* Case No. Civ. 80-3043 (Cent. Div. S. D. U. S. D. C.); *Leigh v. Olson,* No. A3-79-78 (U. S. D. C N. D.); *Charles v. Carey,* No. 79-C-4541 and 4558 (U. S. D. C. N. D. Ill.); *Planned Parenthood Association of Kansas City v. Ashcroft,* 483 F. Supp. 679 (1980) (on appeal to the Eighth Circuit Court of Appeals); *Margaret S. v. Edwards,* 488 F. Supp. 1981 (1980); *Planned Parenthood v. Blanton,* No. 78-2310 (U. S. D. C. W. D. Tenn.); *Akron Center for Reproductive Health v. City of Akron,* 479 F. Supp. 1172 (1979) (on appeal to the Sixth Circuit Court of Appeals); *Women's Community Health Center, Inc. v. Cohen,* 477 F. Supp. 542 (D. Me. 1979); and *Planned Parenthood League of Massachusetts, et al. v. Francis Bellotti, supra.*

U. S. at 77-79 (informed consent); *Planned Parenthood Association v. Fitzpatrick,* 401 F. Supp. 554 (E. D. Pa. 1975), aff'd 428 U. S. 901 (informed consent); and, most recently, *Harris v. McRae,* 65 L. Ed. 2d 784 at 804-5 (public funding).

Plenary consideration will provide the opportunity for this Court to clearly identify the appropriate legal standard to be applied in judging the constitutionality of state laws regulating the performance of first trimester abortions and in particular the permissibility of statutes which attempt to enhance the giving of informed consent and provide for a waiting period in which information given to the abortion patient can be carefully considered. Absent such a ruling, there will be continuing conflict in the Circuit Courts and repeated attempts by the states to enact constitutionally permissible legislation which will no doubt spawn more litigation.

II.

The factual finding by the trial court that a portion of the informed consent statute, Neb. Rev. Stat. § 28-326 (8) (a) and the forty-eight hour waiting period created "an undue burden" was unsupported by the record.

We immediately recognize that it is rare for this Court to delve into disputed factual findings, but we submit that the trial court's findings stem not only from a failure to fairly weigh the evidence but also involve a misapprehension by it of what is or is not an "undue burden" under *Roe v. Wade, supra,* and its progeny. We also

raise this issue to highlight the necessity for this Court to clearly establish the appropriate legal standard to be adopted by the lower federal courts in reviewing abortion control legislation.

Briefing limitations do not permit us as full a discussion of this issue as we would like, but we do emphasize two important points. First, the trial court admitted that in weighing the evidence it intentionally chose to disregard "extensive evidence" presented by the defendants regarding the long term consequences of first trimester abortions and the unsavory medical practices[9] of appellees' abortion clinics.[10] Secondly, the opinions below do not discuss in any respect the affect of the emergency clause governing the allowed waiver of the forty-eight hour waiting period. The statutory definition applicable to the emergency clause states, "Emergency situation shall mean a condition exists that in the sound medical judgment of the physician the abortion should be performed without delay so as not to adversely affect the best physical or mental health of the woman." Neb. Rev. Stat. § 28-326(7) (Reissue 1979).

We would further submit that the use of the phrase "undue burden" by the trial court must be examined in light of the legal standard adopted by that court. On no less than four occasions the trial court opinion states that

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9 These practices included for example the absence of any counseling at one clinic and the administration, before counseling and the expression of informed consent, of valium to minors at the other clinic.

10 The Statement of the Case at page 4 more fully discusses this evidence.

the analysis of the challenged statutes required "the most exacting judicial scrutiny." *Womens Services, Inc. v. Thone, supra,* at 1042-1044, 1050. Simply stated, the opinions below hold that any abortion regulation which affects the first trimester and carries a criminal penalty creates an "undue burden" because it is a "direct obstacle" to abortion.

The trial court's factual finding of "undue burden" was the product of an improper analysis which made any interference—regardless of its time delay or monetary cost—a "direct obstacle" to an abortion. Under this analysis even a one hour waiting period would be an "undue burden." The record should therefore be looked at anew by this court to determine if the challenged statutes are unduly burdensome or if they are, as we argue, reasonable and related to the legitimate state interest of protecting the decision making process of the abortion patient.

III.

The parental consultation statute, Neb. Rev. Stat. § 28-333 (Reissue 1979), does not violate a minor's abortion liberty right.

The Nebraska parental consultation statute, Neb. Rev. Stat. § 28-333 (Reissue 1979) is, we submit for purposes of constitutional review, identical to the act passed by the Legislature of the State of Utah and found to be without constitutional defect by the Supreme Court of Utah. *H. L. v. Matheson,* 604 P. 2d 907, 913 (Utah 1978), which case is currently docketed in this Court, *H. L. v. Matheson,* Sup. Ct. Doc. No. 79-5903. We offer no further

argument by way of this appeal. We desire only to keep alive this issue pending decision by this Court in *H. L. v. Matheson, supra.*

IV.

A party who faces potential criminal liability under a general criminal accomplice statute has no direct threat of personal detriment sufficient to maintain standing in an action challenging the constitutionality of a state statute.

Article III of the United States Constitution prohibits federal courts from ruling on the constitutionality of state statutes unless the litigants are in actual controversy. *Baker v. Carr,* 369 U. S. 186, 204 (1962). It is undisputed that the appellee Ladies Center, Nebraska, Inc. cannot be prosecuted directly for violations of the challenged statutes since those statutes are directed at licensed physicians and not persons who provide administrative assistance to the physician who performs abortions. In *Doe v. Bolton,* 410 U. S. 179 at 189, this Court observed:

> The parallel claims of the nurse, clergy, social worker, and corporation-appellants are another step removed and as to them, the Georgia statutes operate less directly. Not being licensed physicians, the nurses and the others are in no position to render medical advice. They would be reached by the abortion statutes only in their capacity as accessories or as counselor-conspirators. We conclude that we need not pass upon the status of these additional appellants in this suit, for the issues are sufficiently and adequately presented by Doe and the physician-appellants, and *nothing is gained or lost* by the presence or absence of the nurses, the clergymen, the social workers, and the corporations.

(Emphasis added.) Appellants have not disputed the standing of the other appellees and therefore one might wonder what is "gained or lost by the presence or absence of" the appellee, Ladies Center, Inc. As argued at the trial stage and on appeal, our concern rests with the application of 42 U. S. C. § 1988 which was amended after *Doe v. Bolton* and now permits the award of attorneys fees as costs in any 42 U. S. C. § 1983 action. Appellee, Ladies Center, Inc., in the instant case was awarded $25,898.70 on its claim for attorneys' fees and other costs. *See,* App. F. The presence of appellee, Ladies Center, Nebraska, Inc., was not essential, or for that matter noticeably beneficial to the presentation of the alleged civil rights violations by the other appellees; at very best, it was cumulative to the efforts of those appellees whose standing we do not challenge.

This Court has continuously stressed its concern about the cost of modern day litigation which cost is always enhanced by the presence of unneeded parties. If not reversed, the holding of the Eighth Circuit permitting Ladies Center, Nebraska, Inc. to maintain standing will only encourage proliferation of multi-party civil rights litigation without any resulting benefit but with the added exposure to good-faith defendants of excessive attorney fee awards.

V.

The trial court erred in declining to abstain from the ruling on Neb. Rev. Stat. § 28-326 (8) (a) (Reissue 1979).

The abstention doctrine requires a federal court to withhold consideration of the constitutionality of an un-

construed state statute where that statute is "susceptible of a construction by the state judiciary" which might avoid in whole or in part the necessity for federal constitutional adjudication or at least materially change the nature of the problem.

Appellants' abstention motion dealt with the interpretation of Neb. Rev. Stat. § 28-326(8) (Reissue 1979) which statute defined "informed consent" as follows:

> Informed consent shall mean a written statement, voluntarily entered into by the person upon whom an abortion is to be performed, whereby she specifically consents to such abortion. Such consent shall be deemed to be an informed consent only if it affirmatively appears in the written statement that the person upon whom the abortion is to be performed has been advised (a) of the reasonably possible medical and mental consequences resulting from an abortion, pregnancy, and childbirth, (b) of possible alternatives to abortion, including childbirth and adoption and including that there are agencies and services available to assist her to carry her pregnancy to a natural term, and (c) of the abortion procedures to be used. Such statement shall bear the signature of the person upon whom the abortion is to be performed and be signed by the attending physician.

Appellants argued at trial that *per se* compliance with the statute would exist if a written statement was voluntrily executed by the patient and if it contained language affirming that the patient had been informed of the topics identified in subparagraphs (a), (b), and (c) of the above cited statute. The trial court interpreted the statute to permit a criminal prosecution based upon an allegation that the physician had not in fact given the identified topics of information. In his order of August 9,

1979, Judge Urbon agreed that "the proposed construction [defendants'] of the informed consent provision would significantly affect the nature of the constitutional questions involved."

It is unquestioned that under controlling Nebraska case law it is the duty of a court to adopt a construction which, without doing violence to the fair meaning of the statute, will render it valid. *Anderson v. Tiemann*, 182 Neb. 393, 155 N. W. 2d 322 (1967). We submit that the court's interpretation of § 28-327 was plain error and that, at the very least, the court should have abstained so as to allow state court interpretation of the statute's requirement.

We further add that the court similarly erred in interpreting Neb. Rev. Stat. § 28-343 (Reissue 1979) by finding that the referral of an abortion patient would amount to a "prescription" and that the reporting of such referrals would therefore be unconstitutional.

If *any* doubt existed as to the proper interpretation of these statutes, the trial court should have abstained and permitted state court review. *Bellotti v. Baird*, 438 U. S. at 147.

CONCLUSION

In *Planned Parenthood v. Danforth* this Court recognized the importance of an informed abortion decision. The Nebraska Unicameral has acted to enhance, in a needed and reasonable manner, the giving of informed

consent. Absent a clear and convincing showing that the statutes will unduly burden the abortion privacy right, the severe application of a finding of unconstitutionality is not warranted. In fact, such a finding runs counter to the real and present needs of women seeking care at abortion clinics like those of appellees.

The impact of the issues raised herein are substantial. Failure to reverse the decision of the Eighth Circuit Court of Appeals will send a clear message to the courts now examining similar legislation and to state legislatures studying yet to be enacted statutes that the states may not seek to protect women seeking first trimester abortions by attempting to insure that their decision is made knowingly and without undue pressure or influence of abortion profiteers.

Respectfully submitted,

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Attorneys for Appellants

No. .....

In The

Supreme Court of the United States

October Term, 1980

WOMENS SERVICES, P.C., et al.,
Appellees,

vs.

CHARLES THONE, Governor of the State of Nebraska, et al.,
Appellants.

LADIES CENTER, NEBRASKA, INC., et al.,
Appellees,

vs.

CHARLES THONE, Governor of the State of Nebraska, et al.,
Appellants.

WOMENS SERVICES, P.C., et al.,
Appellees,

vs.

CHARLES THONE, Governor of the State of Nebraska, et al.,
Appellants.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX

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TABLE OF CONTENTS

Page

Appendix A

Womens Services, P.C. v. Thone, 483 F. Supp. 1022 (D. Neb. 1979) 1

Appendix B

Partial Summary Judgment Opinion in *Womens Services, P.C. v. Thone,* supra 55

Appendix C

Order Denying Abstention in *Womens Services, P.C. v. Thone,* supra 61

Appendix D

Womens Services, P.C. v. Thone, Case Nos. 80-1192 and 1193 Slip Op. (8th Circuit) 12/8/80 65

Appendix E

Neb. Rev. Stat. § 28-325 et seq. (Reissue 1979) 74

Appendix F

Attorney's Fee Judgment in *Womens Services, P.C. v. Thone,* supra 85

Appendix G

Notice of Appeal to U. S. Supreme Court 87

P.C. v. Thone, supra 55

APPENDIX A

WOMENS SERVICES, P.C., a Nebraska Corporation, and G. William Orr, M. D.,

Plaintiffs,

vs.

Charles THONE, Governor of the State of Nebraska; Paul L. Douglas, Attorney General for the State of Nebraska; and Donald L. Knowles, County Attorney for the County of Douglas, State of Nebraska,

Defendants.

WOMENS SERVICES, P.C., a Nebraska Professional Corporation, and G. William Orr, M. D.,

Plaintiffs,

vs.

Charles THONE, Governor of the State of Nebraska, Paul L. Douglas, Attorney General for the State of Nebraska; and Donald L. Knowles, County Attorney for the County of Douglas, State of Nebraska,

Defendants,

Marilyn A. Schneider,

Intervenor-Defendant.

LADIES CENTER, NEBRASKA, INC., a corporation; M. John Epp, M. D.; and Betty Roe, by her next friend, Barbara Gaither,

Plaintiffs,

Elizabeth F.,

Intervenor-Plaintiff,

vs.

Charles THONE, Governor of the State of Nebraska; Paul L. Douglas, Attorney General for the State of Nebraska; and Donald L. Knowles, County Attorney for the County of Douglas, State of Nebraska,

Defendants,

Marilyn A. Schneider,

Intervenor-Defendant.

Nos. CV 78-L-289, CV 79-L-85
and CV 79-L-100.

United States District Court,
D. Nebraska.

Nov. 9, 1979.

MEMORANDUM OF DECISION

URBOM, Chief Judge.

On April 20, 1979, this court preliminarily enjoined several portions[1] of the Nebraska abortion law, Legislative Bill 316.[2] This opinion follows a full hearing on the merits; it speaks to the standing and religious freedom issues before addressing the specific sections in question.[3]

---

1 Enjoined were §§ 28-326 (8), 28-327, 28-333, 28-334, and, insofar as it requires the reporting of "prescribed" abortions, 28-343.

2 The predecessor of L.B. 316, L.B. 38, contained sections marked 28-325 to 28-345. At a hearing on December 28, 1978, I preliminarily enjoined §§ 28-327 to 28-334, inclusive, 28-336, and 28-343 to 28-345, inclusive. The legislature responded by passing L.B. 316, which repealed many of the sections of L.B. 38 and enacted new sections in their place. Those sections substituted were 28-326, 28-327, 28-329, 28-330, 28-331, 28-333, 28-334, 28-342, 28-343, and 28-345. Several of the sections of L.B. 38 thus remain intact.

CV 78-L-289 challenged provisions of L.B. 38. Two actions, CV 79-L-85 and CV 79-L-100, were brought after the passage of L.B. 316 and challenged the remaining sections of L.B. 38, except § 28-335, and the sections of L.B. 316.

3 The scope of the three lawsuits in this case has been considerably narrowed since the entry of a preliminary injunction on the provisions of L.B. 316 listed in footnote 1. By an

(Continued on next page)

I.

STANDING OF LADIES CENTER, INC. AND BETTY ROE

The standing doctrine, as it limits the jurisdiction of federal courts, consists of "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin,* 422 U. S. 490, 498, 95 S. Ct. 2197, 2205, 45 L. Ed. 2d 343 (1975). The constitutional aspect, which presents the threshold and only standing question in this case,[4] stems from Article III of the Constitution of the United States, which restricts judicial power to "cases" and "controversies." This aspect of standing focuses on:

> ". . . whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction

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order dated July 6, 1979, the three lawsuits were consolidated and the repealed sections of L.B. 38 were removed from consideration. By an order dated August 1, 1979, the plaintiffs were granted partial summary judgment with respect to the parental consultation requirements only of § 28-333, and with respect to § 28-336. The order dated August 1, 1979, also granted the plaintiffs' motion for leave to amend, and the plaintiffs deleted their challenges to the constitutionality of §§ 28-329 to 28-332, inclusive.

4 The other aspect of standing concerns itself with "judicial self-goverance," whereby courts should avoid deciding "abstract questions of wide public significance" when other governmental institutions are more competent to address the questions and when judicial intervention is unnecessary to protect individual rights. *Warth v. Seldin,* 422 U. S. 490, 500, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). This aspect functions to screen out litigants who, for example, have only a "generalized grievance" or who inappropriately seek to assert the interests of third parties. *Id.,* at 499, 95 S. Ct. 2197.

> and to justify exercise of the court's remedial powers on his behalf. *Baker v. Carr,* 369 U. S. 186, 204 [82 S. Ct. 691, 703, 7 L. Ed. 2d 663] (1962). . . . A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action . . . .' *Linda R. S. v. Richard D.,* 410 U. S. 614, 617 [93 S. Ct. 1146, 1148, 35 L. Ed. 2d 536] (1973). . . . "
>
> *Warth v. Seldin,* 422 U. S. at 498-499, 95 S. Ct. at 2205.

A.

The plaintiff Ladies Center, Inc. is a Florida corporation authorized to do business in Nebraska. It provides facilities and support staff to physicians who perform abortions and other gynecological services on its premises. While Ladies Center does not employ the physician, who is an independent contractor, it does employ the members of the support staff. The "informed consent" currently obtained from patients, as well as other steps in the preparation of the patient for an abortion, is routinely carried out by Ladies Center employees.

By the order of April 20, 1979, the court certified a class of plaintiffs, consisting of all organizations which offer and provide facilities and a support staff to physicians who perform abortions. Ladies Center, the moving party, was designated class representative.

That Ladies Center satisfies the Article III dimension of standing is beyond serious dispute. It has a direct interest in how the court resolves the challenged statutory sections. As the physician who performs abortions faces potential criminal liability for failing to comply with

the disputed sections, Ladies Center faces potential criminal liability as a person[5] who aids, abets, or causes another to commit a crime. This potential criminal liability is of the same magnitude as that of the physician. § 28-206, R. R. S. Neb. (Cum. Supp. 1978). The physician, against whom the criminal statutes are aimed, clearly has standing. *Doe v. Bolton,* 410 U. S. 179, 188, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973). Accomplice liability creates a similar "direct threat of personal detriment," see *id.,* and therefore gives rise to standing. *Baird v. Bellotti,* 393 F. Supp. 847, 851 (U. S. D. C. Mass. 1975), vacated and remanded on other grounds, *sub nom. Bellotti v. Baird,* 428 U. S. 132, 96 S. Ct. 2857, 49 L. Ed. 2d 844 (1976).

Because there is potential criminal liability, Ladies Center does not have standing problems of a nonconstitutional nature.[6] Its personal involvement is direct, specific, and concrete.

---

5 Section 28-109 (16), R. R. S. Neb. (Cum. Supp. 1978), states that a "person," when relevant, shall mean a corporation.

6 Another ground for standing is conceivable. Ladies Center, Nebraska, Inc. is, in part, the subject of regulation by the challenged legislation which may work to deprive third parties—women seeking abortions and doctors seeking to provide abortions—of their constitutional rights. Other plaintiffs, somewhat similarly situated to Ladies Center, have been granted standing "as advocates of the rights of third parties who seek access to their market or function." *Craig v. Boren,* 429 U. S. 190, 192-197, 97 S. Ct. 451, 454-456, 50 L. Ed. 2d 397 (1976); *Eisenstadt v. Baird,* 405 U. S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972).

Because the ground of potential criminal liability is sufficient to bring standing to Ladies Center, it need not rely on cases involving *jus tertii* standing.

B.

At the time of the filing of her complaint Betty Roe alleged that she was pregnant and desired an abortion. Testimony at the trial indicates that although she was pregnant at the time of passage of Legislative Bill 316, March 22, 1979, she procured an abortion before the date on which L.B. 316 became operative, April 21, 1979.

By the order of April 20, 1979, this court certified on the motion of Betty Roe a class of plaintiffs, consisting of all patients desiring abortions. In addition, by the order of September 14, 1979, the court granted intervention on behalf of Elizabeth F. and certified again the class of pregnant women seeking an abortion in Nebraska.

The defendants contend that, because Betty Roe was not pregnant at the time the challenged legislation became operative, she could allege no more than speculative injury due to that legislation. Her status, they argue, cannot be distinguished from that of the Does in *Roe v. Wade,* 410 U. S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). The Supreme Court in *Roe v. Wade* denied standing to a married, childless couple, John and Mary Doe. Although Mrs. Doe had been advised by her doctor to avoid pregnancy, she was not pregnant at the time of the filing of her pleading. Their injury due to the Texas abortion statutes, thus, was too speculative to engender standing. The court said:

> ". . . Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may not take place . . . But we are not prepared to say that the bare allegation of

> so indirect an injury is sufficient to present an actual case or controversy. . . ."
>
> *Id.*, at 128, 93 S. Ct. at 714.

The plaintiff Betty Roe argues that L.B. 316 became "effective" when Governor Thone signed it into law on March 22, 1979; thus, because she was pregnant at the time she filed her complaint, April 3, 1979, she was then faced with a threat of harm from the legislation. She contends that the emergency clause, § 15, caused the act to operate immediately after its passage. The plaintiff Roe also argues that if a pregnant woman does not have standing because an abortion law is not presently operating, then it is possible that she may never have standing to challenge that law, because it may be enjoined before it becomes operative.

Section 15 of L.B. 316 provides:

> "Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law."

Section 12 of that bill states that the "act shall become operative thirty days after its effective date."

While the act may be deemed, as a matter of semantics, "effective" after its passage due to the terminology of § 15, the dictates of the act do not impinge upon anyone until the statute becomes operative. A plain reading of § 12 and the bill as a whole clearly indicates that the act was not to operate until thirty days had passed after its approval.

Betty Roe contends that the thirty-day hiatus before operation of the statute was to permit the institution of

lawsuits challenging the law. Although this may have been so, there is nothing in the language of the act or in its legislative history to indicate that the legislature intended to create standing on behalf of those who would not otherwise have standing. Certain persons—for example, physicians desiring to perform abortions—already unquestionably possessed standing to challenge the act. The inference, then, if the legislature intended to permit legal action during the thirty-day period, is that it intended to allow those with standing to challenge the act. Nothing would lead one to believe that the legislature intended to create a personal interest in that action on behalf of women who would not be pregnant at the time of the act's operative date.

To obtain standing the plaintiff must allege a personal stake in the outcome of the controversy sufficient to warrant exercise of the court's remedial powers on her behalf. *Warth v. Seldin,* 422 U. S. at 498, 95 S. Ct. 2197. The time at which the plaintiff must possess that personal interest is at the filing of the complaint. Once the plaintiff has standing, the question of the effect of a change in circumstances goes to mootness.

The crucial date at which the provisions of the act create a personal stake on behalf of its proposed subjects is the date the act becomes operative, not the date of its passage. Only when the act operates—i. e., has the capacity to be enforced—does it intrude upon the decision-making process of those affected by it. For one to have a personal stake in a challenge to an act, one must be currently affected, in the position of being imminently affected, or, certain to be affected in the future by the

act; otherwise, the act simply does not bear on that individual.

Because Betty Roe was not affected or in threat of being affected by L.B. 316 at the time she filed her lawsuit, she did not have standing. Although she was pregnant, there was no way the abortion law could interfere with her plans to terminate that pregnancy. She suffered neither injury nor threat of injury due to the challenged law. At the time she filed her complaint this was apparent.[7]

The situation in the present case is different from other cases where the pregnant woman has been granted standing. For example, in *Roe v. Wade, supra,* the abortion law was in effect at the time the pregnant woman challenged it; in *Baird v. Bellotti, supra,* at 850-851 and n. 6, the pregnant woman brought suit shortly before the effective date of the statute. The *Baird* court noted that "the statute . . . would prevent her . . . from obtaining an abortion without compliance with its terms." 393 F. Supp. at 851. Standing was created by the fact that the statute's imminent operation would have burdened her exercise of her rights. The issuance of an injunction did not nullify that standing; if anything, that action would go to mootness.[8] The case at bar differs significantly from *Baird.*

---

7 At the time Betty Roe filed her complaint there remained three weeks before L.B. 316 was scheduled to become operative. She desired an abortion at the time she filed her complaint. The court received no evidence which would indicate that three weeks is an insufficient time in which to procure an abortion under the then-existing laws of Nebraska.

8 For purposes of mootness, pregnancy is treated differently from some other conditions. The same considerations sup-

(Continued on next page)

II.

RELIGIOUS FREEDOM

The First Amendment to the Constitution of the United States forbids the state[9] to make any law "respecting an establishment of religion, or prohibiting the free exercise thereof." The plaintiffs contend that the legislation in question violates both the Establishment Clause and the Free Exercise Clause.

A.

Legislation challenged under the Establishment Clause may survive constitutional scrutiny only where it satisfies a three-part test. It:

> ". . . first, must reflect a clearly secular legislative purpose, . . . second must have a primary effect that

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(Continued from previous page)

porting that different treatment, however, do not apply with respect to standing. The time-consuming aspects of trial and the appellate process affect the feasibility of maintaining a live controversy throughout the process. See, e. g., *Doe v. Poelker*, 497 F. 2d 1063, 1067 (C. A. 8th Cir. 1974). The time-consuming dimension of the judicial process does not affect the establishment of standing at the moment of the filing of the complaint; standing must exist at that one point. Afterward, considerations of mootness, with its special allowance for pregnancy, control.

9 The First Amendment specifically enjoins action by Congress. Through the Due Process Clause of the Fourteenth Amendment, the First Amendment has been applied to the states. See, e. g., *Everson v. Board of Education*, 330 U. S. 1, 8, 67 S. Ct. 504, 91 L. Ed. 711 (1947); *Pierce v. Society of Sisters*, 268 U. S. 510, 535, 45 S. Ct. 571, 69 L. Ed. 1070 (1925).

> neither advances nor inhibits religion, . . . and, third, must avoid excessive government entanglement with religion . . . "
>
> *Committee for Public Education v. Nyquist,* 413 U. S. 756, 773, 93 S. Ct. 2955, 2965, 37 L. Ed. 2d 948 (1973).

The plaintiffs attack the current Nebraska abortion legislation on each part of the test.

1. *Purpose*

The plaintiffs assert that the legislation under examination has no clearly secular purpose. They maintain that at the heart of the legislation is the belief that life begins at conception. Because this belief is a religious belief, the plaintiffs argue, this legislation fails to embody a clearly secular purpose.

The following elements must be established before the court can adopt the plaintiffs' position: a. that the idea that life begins at conception was a motivating principle of the legislation; b. that the conviction that life begins at conception can be a "religious" belief for purposes of the Establishment Clause and was a motivating principle for this legislation in its capacity as a "religious" belief; and c. that there is no purpose for this legislation, the protection of fetal life aside, which amounts to a clearly secular purpose.

a.

The first element has clearly been established. At trial the defendants through their counsel affirmed the following statement, taken from page 3 of their brief dated April 6, 1979:

> "Defendants admit without qualification that the statutes in question were enacted and will be enforced in the interest of unborn children from the moment of conception. We do so based on the strong and legitimate right of the state's interest in the fetus. *Maher v. Roe,* 432 U. S. 464, 478[, 97 S. Ct. 2376, 53 L. Ed. 2d 484] n. 11 (1977)."

Moreover, the legislature openly proclaims its intent to protect fetal life. The intact declaration of purpose for L.B. 38, the predecessor of L.B. 316, reads as follows:

> "28-325. Abortion; declaration of purpose. The Legislature hereby finds and declares:
>
> (1) That the following provisions were motivated by the legislative intrusion of the United States Supreme Court by virtue of its decision removing the protection afforded the unborn. Sections 28-325 to 28-345 are in no way to be construed as legislatively encouraging abortions at any stage of unborn human development, but is rather an expression of the will of the people of the State of Nebraska and the members of the Legislature to provide protection for the life of the unborn child whenever possible;"

b.

The second element presents a difficult conceptual issue. It must be determined whether the tenet that life begins at conception constitutes a religious belief within the context of the Establishment Clause. The issue is one which cannot be taken lightly, because, on the one hand, it has the potential to involve deeply meaningful personal rights, and on the other hand, its determination could remove vast areas of human conduct from the legislative domain.

This segment of the opinion first discusses general considerations touching the definition of religious belief. It

then addresses the bearing of testimony on the issue. Next, it considers several of the plaintiffs' proffered positions. Finally, it evaluates the life-at-conception principle within the parameters of religious belief, both theistic and nontheistic, established in the first subsection.

i.

Delimiting the expanse of religious belief for First Amendment purposes—either Free Exercise or Establishment—[10] may not be done by resort to a solitary standard. Neither the Constitution nor the Supreme Court has defined religion in this context, and Supreme Court decisions have trod a tortuous path. E. g., *Walz v. Tax Commission,* 297 U. S. 664, 668, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970). Modern decisions do indicate, however, that the Religion Clauses contemplate both theistic and nontheistic religious beliefs. See *Torcaso v. Watkins,* 367 U. S. 488, 495, 81 S. Ct. 1680, 6 L. Ed. 2d 982 and n. 11

---

10 Although some commentators feel that the definition of religion must differ as between its use in the Establishment Clause and its use in the Free Exercise Clause, see, e. g., § 14-6, *American Constitutional Law,* (L. Tribe, 1978), this sentiment is not convincing. See *Everson v. Board of Education,* 330 U. S. 1, 32-33, 67 S. Ct. 504, 91 L. Ed. 711 (1947) (Rutledge, J., dissenting); *Malnak v. Yogi,* 440 F. Supp. 1284, 1316, n. 20 (U. S. D. C. N. J. 1977); Merel, "The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment," 45 U. Chi. L. Rev. 805, 829, n. 128, and accompanying text (1978).

As Justice Rutledge notes in *Everson v. Board of Education,* the Constitution employs the word "religion" only once for both clauses. Both the principle of statutory construction and the absence of any Framers' intent to the contrary point toward a single definition of religion in the First Amendment. Discussion regarding the definition of religion proceeds from this basis.

(1961); see, generally, *Wisconsin v. Yoder,* 406 U. S. 205, 215, 92 S. Ct. 1526, 32 L. Ed. 2d 15 and n. 6 (1972), citing *Welsh v. United States,* 398 U. S. 333, 357, n. 8, 90 S. Ct. 1792, 26 L. Ed. 2d 308 (1970) (Harlan, J., concurring); *McGowan v. Maryland,* 366 U. S. 420, 465-466, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961) (Frankfurter, J., concurring). It is instructive to consider these two poles of religious belief individually.

The traditionally dominant constitutional view of religious belief has dealt with man's relationship to a Supreme Being. This was the posture of the Framers. See, e. g., Jefferson, "An Act for Establishing Religious Freedom" and "Notes on Virginia;" Madison, "A Memorial and Remonstrance on the Religious Rights of Man," in *Cornerstones of Religious Freedom in America* (J. Blau, 1949). It was also the theme in Supreme Court decisions until relatively recent times. E. g., see *Davis v. Beason,* 133 U. S. 333, 342, 10 S. Ct. 299, 33 L. Ed. 637 (1890) (religion encompasses one's relationships with his Creator and the concomitant obligations of reverance and obedience to His will); *United States v. Macintosh,* 283 U. S. 605, 633-634, 51 S. Ct. 570, 75 L. Ed. 1302 (1931) (Hughes, C. J., dissenting), overruled, *Girouard v. United States,* 328 U. S. 61, 66 S. Ct. 826, 90 L. Ed. 1084 (1946).

Most major modern decisions, moreover, have dealt with theistic religious beliefs. See, e. g., *Constitutional Law,* Ch. 14 (G. Gunther, 9th ed. 1975). Because the presence of religious activity was not an issue in those cases, none of them effectively offers more than a factual situation to indicate one set of coordinates in the religious plane. That religious plane includes, for example, recita-

tion of a prayer to a Supreme Being, *Engel v. Vitale,* 370 U. S. 421, 82 S. Ct. 1261, 86 L. Ed. 2d 601 (1962); the reading of Bible verses, *Abington School District v. Schempp,* 374 U. S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963); affirmation of belief in a Supreme Being, *Torcaso v. Watkins,* supra; and the teaching of divine creation, *Epperson v. Arkansas,* 393 U. S. 97, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968). From these examples, it may be extracted that a theistic religious belief for First Amendment purposes is one that it attributable to or based upon the will of God. See *Davis v. Beason,* 133 U. S. at 342, 10 S. Ct. 299.

Before discussing nontheistic religious belief, I note that the plaintiffs' evidence regarding religious freedom consisted primarily of testimony of experts in the field of theistic religious beliefs. Their Establishment argument pivots largely on the position of the Roman Catholic Church regarding the life-at-conception principle, and, to a lesser extent, the positions of other churches which are based on a belief in God and obedience to His will. Their Establishment argument thus is made on the assertion that the motivating purpose for this legislation was a *theistic* religious belief. Both theistic and nontheistic religious belief bases, however, should be explored.

The Supreme Court has done little to map out the terrain of nontheistic religious belief. In its one major excursion to date, *Torasco v. Watkins,* supra, the court struck down a provision of the Maryland Constitution which required appointees to state offices to declare their belief in the existence of God as a condition of obtaining their commissions. This provision had operated to deny

a Secular Humanist, who had refused to declare a belief in God, an appointment as a public notary. The court stated:

> ". . . [N]either a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."
>
> 367 U. S. at 495, 81 S. Ct. at 1683-1684.

The court in a footnote in that case listed several nontheistic religions:

> "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others. . . ."
>
> 367 U. S. at 495, n. 11, 81 S. Ct. at 1684, n. 11.

A nontheistic belief which qualifies as religious in the First Amendment sense is one limited at least to a belief of an adherent to an organized, nontheistic group. Whatever else nontheistic religion is, it has at least two essential qualities: *tenets* and *organization*. Three reasons support the foregoing conclusion.

First, this is the boundary presently staked out by the court in *Torcaso*.

Second, the expansion of nontheistic religious belief to one of mere "personal conscience," rather than adherence to an organized group, would put the trial court in a position of evaluating a complainant's constitutional rights based on its impression of his sincerity or credibil-

ity. This obviously presents a great possibility of dissimilar treatment of similarly situated complainants. Furthermore, it might devolve to the elitist end of protecting the constitutional rights of the articulate more than those of the inarticulate. Carried to its logical conclusion, such a standard would either be meaningless or result in artificial and arbitrary distinctions.

Third, an expansion of nontheistic religious belief beyond the above-articulated standard would go beyond the path charted by the Supreme Court in *Wisconsin v. Yoder*, supra:

> ". . . [T]o have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. *Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.*" (Emphasis added)
>
> 406 U. S. at 215-216, 92 S. Ct. at 1533

A standard less than that articulated above would degenerate into a question of personal preference, even if it were deeply felt. This *Yoder* clearly speaks against.

From the foregoing discussion of non-theistic religious belief as related to the First Amendment, it follows that the Supreme Court's broad reading of religious belief when interpreting modern congressional draft laws found in *United States v. Seeger,* 380 U. S. 163, 85 S. Ct. 850, 13 L. Ed. 2d 733 (1965), and *Welsh v. United States,* 398 U. S. 333, 90 S. Ct. 1792, 26 L. Ed. 2d 308 (1970), does not apply to its reading of religious belief in the context of the First Amendment. See, also, *Malnak v. Yogi,* 440 F. Supp. 1284, 1314 (U. S. D. C. N. J. 1977) (discussing why the majority-opinions in *Seeger* and *Welsh* are not significant with respect to the definition of religious belief for purposes of the First Amendment Clauses). The Supreme Court has studiously framed the conscientious objector issue narrowly as one of statutory, rather than constitutional, construction. *E. g., United States v. Seeger,* 380 U. S. at 174, 90 S. Ct. 1792.

ii.

The court received conflicting testimony during trial about the idea that life begins at conception is a religious idea. This specific question, however, is not one to be resolved on the basis of burden of proof or credibility of witnesses; it is a question of law for the court to decide. *Malnak v. Yogi,* 440 F. Supp. at 1303-1304. Otherwise, the concept of a religious belief could fluctuate from case to case, and similar or identical beliefs could be either religious or not religious, depending solely on differences of testimony elicited and perceptions of the trier of fact. See *id.,* at 1318.

Moreover, other implications of allowing religious leaders to determine which beliefs are "religious" cut

against the grain of the First Amendment. Differing religious denominations take different positions on the subject with different references to and different interpretations of scriptures. The mere fact that religious groups disagree or quote the Bible to support public positions or take political action to further their positions, however, will not transform a controversy into a dispute among "religious" beliefs of the type of which the Establishment Clause curtails resolution in the political arena. If this were not the case, state regulations concerning areas such as intoxicating beverages, homosexuality, obscenity, and even marriage and divorce, would be beyond state regulation. As the Supreme Court through Mr. Chief Justice Burger said:

> "Adherents of particular faiths and individual churches frequently take strong positions on public issues including, as this case reveals in the several briefs *amici*, vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right. No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement."
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> *Walz v. Tax Commission*, 397 U. S. 664, 670, 90 S. Ct. 1409, 1412, 25 L. Ed. 2d 697 (1970).

The testimony concerning the scope of "religious" belief has value, but only to provide a background for determination of the legal issue.

iii.

The plaintiffs suggest that, where societal rules are based upon principles which coincide with dictates of faith, these rules may be considered secular, if they are "accepted

by overwhelming social consensus and serve predominately secular ends." See Plaintiffs' Mid-Trial Brief, p. 44. Such a standard, however, would be circular as well as inappropriate for consideration of purpose, because it focuses more on effect than purpose. Furthermore, the rationale of such a standard is not supported by prior decisions. The plaintiffs also hint at a standard[11] which contemplates the individual's "rights of conscience," *id.*, but this, too, is not appropriate. See *Wisconsin v. Yoder,* 406 U. S. 205, 215-216, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972).[12]

Another line of argument employed by the plaintiffs amounts to the following: There is a difference of opinion over when life begins. Science cannot tell us when life begins. Some theologians say that this issue is a "religious" one. Therefore, the belief that life begins at conception is a religious belief.

This argument is not persuasive. It is supported neither by case law nor by reason. Merely because science cannot answer a question does not mean that that question is thrown into the realm of religion for purposes of the Establishment Clause, and this holds true even if theo-

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11 The plaintiffs would derive this standard from the concurring opinion of Mr. Justice Brennan in *Abington School District v. Schempp,* 374 U. S. 203, 231, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963).

12 The word religion imports the same meaning for both clauses in the First Amendment. See footnote 10 above. Discussion in the *Yoder* case, a Free Exercise case, regarding the definition of religion or religious belief is therefore applicable to this discussion involving the Establishment Clause.

logians label the question religious. There are many questions that science cannot answer, because the scientific method neither makes value judgments nor provides underlying definitions to which scientific evidence may be directed. Thus, scientists working within different definitional frameworks may come to different conclusions, when they apply their scientific expertise. Until a particular definition of what constitutes human life has been adopted, the scientist has no framework within which to determine when human life begins. The plaintiffs argue that the definitional question is by necessity one of a religious nature,[13] but this is not so. Not all or even most value judgments or definitions must be considered religious matters, but may be, in the words of Mr. Chief Justice Burger in the *Yoder* case, "philosophical and personal."

The judgment as to what precise set of factors amounts to human life is a matter of individual judgment. For some persons it springs from a belief in a Supreme Being; for others, perhaps from a tenet of a nontheistic religion; and for still others, from philosophical considerations unrelated to a Supreme Being or a tenet of a nontheistic religion. One's judgment on the matter could arise from a combination of these determinants.

So long as a legislature bases its determination as to what factors comprise human life on considerations which

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13 The plaintiffs suggest that the traditional criteria used to determine whether a belief is "religious" is where it is (1) the official belief of a religious institution, and (2) not shared by society as a whole. Post-Trial Brief of Betty Roe, p. 13. To show that this standard is unrealistically broad does not require much attention. Areas such as marriage, divorce, and consumption of alcoholic beverages are examples of areas which would be covered by such a definition. Clearly, the Establishment Clause is not meant to reach that far.

are as capable of being labeled philosophical as religious, the Constitution does not require that the chosen set of factors be called religious or that a different set of factors be chosen.

IV.

For purposes of this case, it will not be necessary to define religious belief further or distinguish it further from philosophical conclusion and the scientific method. The assertion of the Nebraska legislature that life begins at conception may have come from impulses of a philosophical or religious nature or one of the other mixed with scientific data.[14] The evidence before the court does

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14 One scientist testified that at conception an embryo has its own individual genetic code to direct its existence and development, that a fetus is anatomically, physiologically, and in its destiny separate from its mother and that the fetus depends upon its mother only for nourishment and oxygen.

A different scientist, on the other hand, testified that life is a continuum, that both the sperm and the ovum are genetically distinct from its producers [albeit, each only contains half a genetic code necessary to direct human development], and that there is no scientific reason to assign special significance to the moment of conception.

One expert testified that from a religious viewpoint some persons consider the beginning of life to be at conception because the embryo then is calling for a soul and the soul is soon after embodied.

Another expert in religion considered the choosing of some particular moment in the process of creating life to be a value judgment and suggested that value judgments are the prerogative of religion.

There is no constitutional reason to compel a state legislature not to pick the evidence provided by the first scientist as a basis for its decision about the beginning of life. That decision would rest on a philosophical definition of life and scientific evidence to establish what is the likely result of the physical attainment of a set of factors matching that philosophical definition.

not establish that religious considerations—theistic or nontheistic—were a significant motivating force in the passage of the legislation.[15]

The face of the legislation does not suggest a purpose of carrying out either obligations to or the will of a Supreme Being. It does not declare a purpose of adhering to a tenet of a nontheistic religion. Neither does the legislative history. In fact, the contents of the record are consistent with the philosophical side of the life-at-conception principle. Thus analyzed, the legislation reflects a clearly secular purpose within the meaning of the *Nyquist* case, supra.

The legislative record does reveal numerous references to the Catholic Church, one characterization of the subject by a senator as a "church issue," and the characterization by the bill's chief sponsor as embracing the "pro-life philosophy." Nevertheless, the record does not, to the court's knowledge, contain statements by the bill's chief sponsor or any supporting legislator which affirm or assign significance to a belief that this legislation should be passed to bring the law into closer conformity with the

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15 A precise standard of review need not be delineated. It is enough to note a threshold beneath which motivation by a concept as a religious belief could not possibly corrupt a piece of legislation. Such a threshold would be where the concept in its capacity as a religious belief comprises a significant factor in the legislative purpose.

One recent district court decision asserts that legislation passes the purpose test unless it is motivated by a belief that is clearly and singularly religious. *Akron Center for Reproductive Health v. City of Akron,* No. C78-155A (unreported opinion U. S. D. C. N. D. Ohio, August 22, 1979, pp. 22-23). I do not adopt this test, however.

will or design of God or a nontheistic religious principle. The First Amendment does not invalidate legislation because church groups lobbied for it, thereby creating a "church issue." See *Walz v. Tax Commission*, 397 U. S. at 670, 90 S. Ct. 1409.

c.

While the third element to the plaintiffs' position need not be addressed, it should be considered, because such a consideration will show an unquestionably secular purpose for the legislation.

The obvious secular purpose at issue here is that of maternal health. That the legislature was concerned with maternal health is apparent. Subsections 4 and 5 of the intact declaration of purpose for L. B. 38, the predecessor of L. B. 316, say:

> "(4) That currently this state is prevented from providing adequate legal remedies to protect the life, health, and welfare of pregnant women and unborn human life; and
>
> "(5) That it is in the interest of the people of the State of Nebraska to maintain accurate statistical data to aid in providing proper maternal health regulations and education."

Furthermore, the legislative history and a reading of the legislation itself lead to the conclusion that one concern, even though not the dominant one, was that of the pregnant woman's physical and mental well being.

The plaintiffs argue that the legislature's expressed concern for maternal health is not genuine. They maintain that a legislative act genuinely concerned with ma-

ternal health would impose no restrictions on a woman's access to an abortion. These arguments are not persuasive. It is not out of the range of reason for one to think that some regulations on abortion would promote either the mental or physical health of the pregnant woman. The regulations may be unconstitutional, but not because the legislature was irrational or insincere. Also, matters such as "true" legislative intent are too speculative on the facts of this case to compel the disregarding of an apparent legislative purpose. See, also, *Akron Center for Reproductive Health v. City of Akron,* No. C78—155A (unreported opinion U. S. D. C. N. D. Ohio, August 22, 1979, pp. 24-35).

One point should be made about the purpose test in general. The plaintiffs have made extensive arguments along this line and have relied on many cases which do not directly confront problems inherent in putting legislative purpose in this context under the microscope. The Supreme Court has understandably decided the vast majority of its Establishment Clause cases under either the effect test or the entanglement test. Some commentators have asserted that "the primary goal of the Establishment Clause is to protect freedom of choice—to bar the government from doing that which has the potential for inducing religious belief." Note, "Transcendental Meditation and the Meaning of Religion Under the Establishment Clause," 62 Minn. L. Rev. 887, 896 (1978). The primary focus, then, normally would be the effect rather than the purpose of legislation.

2. *Effect*

A law violates the Establishment Clause if its "primary effect" either advances or inhibits religion. The plaintiffs assert that this test is met where it is shown that a law's religious effect is more than remote, indirect, or incidental. This is inaccurate. Although the Supreme Court has characterized the effect of a permissible law as "remote and incidental" in its advantage to religious institutions, it has characterized the effect of an impermissible law as "direct and immediate" with respect to advancing religion. *Committee for Public Education v. Nyquist,* 413 U. S. at 783, 93 S. Ct. 2955, n. 39; see, e. g., *Meek v. Pittenger,* 421 U. S. 349, 95 S. Ct. 1753, 44 L. Ed. 2d 217 (1975). This case does not require either an articulation of a precise standard or a characterization of this law's effect as either "direct and immediate" or somewhere in the middle. The challenged legislation here clearly has no more than a "remote and incidental" effect, if any at all, of advancing or inhibiting religion.

That the law would neither advance nor inhibit religion in more than a remote and incidental way follows from the above discussion of religion as differentiated from science and philosophy. The law regulates a woman's access to abortion, specifically in its dominant provisions, by requiring that she receive certain information and wait forty-eight hours from the time she receives that information before she may obtain an abortion. Here, neither the information nor the delay—the essence of the law—conveys any message to the woman that is necessarily religious in its nature. Moreover, if a woman somehow receives the impression that this is a requirement on

behalf of the state to do what it can to preserve fetal life, then it still may be said that this is not a religious message. There still has been no communication regarding God's will or any reason for the woman to think that the state seeks to implement God's design, the tenet of any religion respecting God's design, or the tenet of any nontheistic religion. For all she knows, the state acts from a philosophical or scientific viewpoint. See *Malnak v. Yogi,* 440 F. Supp. at 1316-1317, n. 20 (principles which happen to coincide with "the dogmas of many religious sects" are not necessarily religious; they become religious, however, if "taught as . . . divine law.").

As stated earlier, the Establishment Clause "should bar the government from doing that which has the potential for inducing religious belief." Note, 62 Minn. L. Rev. at 896. It would stretch the imagination to see how the requirements of this legislation could either induce or inhibit a certain religious belief or religion in general. This case bears no resemblance, for example, to *School District of Abington Township v. Schempp,* 374 U. S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963), where state law and practice required Bible reading sessions in the public schools. The state here does not endorse, either explicitly or implicitly, one "religious" viewpoint or religion in general, and the legislation would not have the tendency of causing someone to avoid, adopt, or abandon "religious" beliefs.

3. *Entanglement*

". . . [F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and ac-

> tive involvement of the sovereign in religious activity. . . ." *Walz v. Tax Commission,* 397 U. S. at 668, 90 S. Ct. at 1411.

The Supreme Court has set out factors germane to the analysis of sponsorship, support, and involvement:

> "In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority. . . ."
>
> *Lemon v. Kurtzman,* 403 U. S. 602, 615, 91 S. Ct. 2105, 2112, 29 L. Ed. 2d 745 (1971)

Legislation which requires "official and continuing surveillance" of a religious institution suggests an "impermissible degree of entanglement." *Walz v. Tax Commission,* 397 U. S. at 675, 90 S. Ct. at 1414.

The legislation in this case shows no sign of entanglement problems. There is no government sponsorship or financial support of religious activity. The government is not actively involved in religious activity. The government has neither aided religious institutions nor engendered a need for surveillance of those institutions.

The plaintiffs' main argument with respect to the entanglement test is that when a state takes a position on abortion it invites political struggles based along lines of religion. The potential for political divisiveness is indeed a relevant factor in some circumstances for entanglement considerations. *Lemon v. Kurtzman,* 403 U. S. at 622, 91 S. Ct. 2105. But it is only a factor, as in the *Lemon* case, where the political divisiveness is sparked and continually fueled by the government regulation and periodic

review of religious institutions. In the case at bar the political divisiveness arises not from a desire to influence annual state appropriations which benefit certain religious institutions, as in *Lemon,* but from a desire with an origin independent of state regulation. Political divisiveness along lines of religion alone would not be sufficient to remove an area from the legislative domain on the grounds of the Establishment Clause. Otherwise, many areas, such as divorce, would be removed from the legislative domain which have been in it since before our nation's birth.

B.

The state may not interfere with the practice of a legitimate religious belief unless it is necessary to do so in order to serve an interest "of the highest order." *Wisconsin v. Yoder,* 406 U. S. at 214-215, 92 S. Ct. 1526; *Sherbert v. Verner,* 374 U. S. 398, 403-406, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963); *Braunfeld v. Brown,* 366 U. S. 599, 606-607, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961). To qualify for protection under the Free Exercise Clause, a belief and practice may not be "merely a matter of personal preference," but must be "one of deep religious conviction, shared by an organized group, and intimately related to daily living." *Wisconsin v. Yoder,* 406 U. S. at 216, 92 S. Ct. at 1533. In addition, the practice must "stem from" one's faith, and be "fundamental to" that faith. *Id; Teterud v. Burns,* 522 F. 2d 357, 360 (C. A. 8th Cir. 1975) (the practice must be "deeply rooted in religious belief"); *People v. Woody,* 61 Cal. 2d 716, 720, 40 Cal. Rptr. 69, 73, 394 P. 2d 813, 817 (1964) (protection provided where the practice played a "central role" in the practitioner's religion).

Examination of the legal standard clearly shows that the plaintiffs may not invoke the protection afforded by the Free Exercise Clause. The plaintiffs have presented no evidence to indicate that a woman's obtaining of an abortion without the regulation imposed by this legislation would constitute a fundamental tenet of any religion. Therefore, the challenged regulation could not interfere with the practice of a fundamental religious tenet.

The plaintiffs presented testimony by various religious leaders to the effect that a woman's decision to abort or to bear a child was a deeply personal and important decision, one that could be considered religious. One witness indicated that under some circumstances the decision to abort would be a moral necessity and agreed that it could be described as a religious duty.

The testimony elicited defeats any free exercise claims. The fact that the decision is one to be made by the individual woman, and the fact that the decision—and thereby practice—will vary only on the ingredients of each woman's situation, indicate that the matter is one of "personal preference" rather than the practice of an organized religion. The fact that the abortion decision may be counseled by a clergyman does not change this aspect. Even accepting, for purposes of argument, that *abortion* could be considered for some a "religious duty," that does not make *abortion without state regulation* a religious duty. See, generally, *Braunfeld v. Brown*, supra. Furthermore, the fact that procuring an abortion may be a religious duty for some, but not for others, who are pregnant indicates that unfettered abortion does not constitute a religious "tenet," much less a "fundamental" tenet of any religion.

In any event, as indicated earlier, the mere labeling of something as coming within a "religious" area by theologians does not serve to make that area "religious" for purposes of invoking First Amendment protections.

III.

FOURTEENTH AMENDMENT

From the filing of the complaints in these actions to the time of trial, the scope of the action has been considerably narrowed.[16] The remaining challenges to the abortion legislation, as crafted at the pretrial conference,[17] question aspects of the record-keeping, informed-consent, and waiting-period provisions. These provisions will be addressed seriatim, after a brief discussion of the applicable standards of review.

Before addressing the merits of the sections in question I note that the court received much evidence about the operation of abortion clinics and the health risks of abortion vis-a-vis those of childbirth. The defendants have presented much of this evidence to create an appellate record for the purpose of seeking to change the standard of review regarding abortion. In deciding the issues now before the court, however, I make only those few findings of fact necessary to determine the constitutional status of

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16 See footnote 3, supra.

17 Several sections have been challenged in the three actions which were not brought up at the pretrial conference. As the challenge to these sections has apparently been abandoned, I rule the following sections constitutional: §§ 28-335, 28-325, 28-342, and 28-345.

the challenged provisions under the present standard of review.

A.

The plaintiffs claim that all or part of the challenged provisions unduly burden a woman's right to terminate her pregnancy, are void for vagueness, and violate the Equal Protection Clause. It is sufficient to set out briefly the standards of review at this point and develop them later as necessary.

1. *Procedural Due Process*

The standard governing consideration of a void-for-vagueness challenge was stated in *Colautti v. Franklin,* 439 U. S. 379, 390, 99 S. Ct. 675, 683, 58 L. Ed. 2d 596 (1979), as follows:

> ". . . [A] criminal statute that 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' . . . or is so indefinite that 'it encourages arbitrary and erratic arrests and convictions,' . . . is void for vagueness. . ."

2. *Equal Protection*

In raising the equal protection claims the plaintiffs apparently seek to trigger strict scrutiny based on the following dicta of the Supreme Court of the United States in *San Antonio School District v. Rodriguez,* 411 U. S. 1, 17, 93 S. Ct. 1278, 1288, 36 L. Ed. 2d 16 (1973):

> ". . . We must decide, first whether the [state legislation] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. . . . If not, the [legis-

> lation] must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment."

Strict scrutiny would nullify any legislative classification impinging on a fundamental right, if that classification were not narrowly drawn to further some compelling state interest. See, e. g., *Shapiro v. Thompson,* 394 U. S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969). The appropriate standard of review, however, is not that of strict scrutiny. The Supreme Court has addressed the *San Antonio School District v. Rodriguez* case in abortion context and has indicated that the rational relationship test would apply where a regulation on abortion differed from regulations on other medical procedures in general. *Maher v. Roe,* 432 U. S. 464, 470-471, 473, 478, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (1977). Furthermore, the court has specifically applied the rational relationship test when adjudicating the constitutionality of a restriction placed on abortion but not placed on other surgery. *Doe v. Bolton,* 410 U. S. 179, 194, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973); see, also, *Carey v. Population Services International,* 431 U. S. 678, 696, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977) (Brennan, J., delivering the judgment of the court on this aspect). Finally, the Supreme Court has made it clear that certain restrictions or regulations may be imposed on abortion (and not imposed on other types of surgery) without labeling the underlying state interests involved fundamental. E. g., *Planned Parenthood of Missouri v. Danforth,* 428 U. S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976) (record-keeping and reporting); *Bellotti v. Baird,* — U. S. —, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979) (requirement of a minor, under certain circum-

stances, to consult with or obtain consent from her parents). Moreover, the policy underlying the application of strict scrutiny under equal protection analysis to certain "fundamental" rights—to ensure effectively equal access to the criminal process, the political process, and education, see, e. g., "Developments," 82 Harv. L. Rev. 1065, 1192 (1969); *Constitutional Law,* 657-665, 689-874 (G. Gunther, 9th ed. 1975)—does not equally apply to legislative enactments regarding abortion. See, generally, *Kramer v. Union Free School District No. 15,* 395 U. S. 621, 627-628, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969) (the rational relationship test is based on the assumption that the political process functions effectively to represent the public; strict scrutiny must be applied when the challenge is to this basic assumption underlying the presumptive validity of legislation). The Supreme Court has implied that this is the case. See, generally, *Maher v. Roe,* supra. The upshot is that a fundamental right for purposes of due process analysis is not necessarily a fundamental right for purposes of equal protection analysis. See *Maher v. Roe,* 438 U. S. at 471-478, 97 S. Ct. 2376. The applicable standard of review regarding classifications made between abortion and nonabortion surgery is whether the classifications in question are rationally related to a legitimate state interest.

One incidental point should be made at this juncture. Although the state's interest in the potential life of the fetus is not compelling prior to viability, it is legitimate. Compare *Roe v. Wade,* 410 U. S. at 154, 93 S. Ct. 705, with *Maher v. Roe,* 432 U. S. at 478, 97 S. Ct. 2376, n. 11.

3. *Substantive Due Process*

Turning to the due process standard which protects the pregnant woman's privacy rights, there need not be much

said in addition to that stated in the April 20, 1979, memorandum granting a preliminary injunction, which was essentially as follows:

> ". . . The right of woman to choose without unduly burdensome interference whether to terminate her pregnancy is fundamental;
>
> ". . . The permissible degree of interference in that decision by the state depends upon the severity of the the technique used by the state and the nature of the state's interest, which interest grows with the duration of the pregnancy;
>
> ". . . A state may not impose any direct obstacles—such as criminal penalties —to further its interest in the potential life of a fetus before viability; and
>
> ". . . A state has no compelling interest in the potential life of the fetus prior to the fetus' viability.
>
> "Two additional cases need to be mentioned: *Planned Parenthood of Missouri v. Danforth,* 428 U. S. 52[, 96 S. Ct. 2831, 49 L. Ed. 2d 788] (1976), and *Planned Parenthood Association v. Fitzpatrick,* 401 F. Supp. 554 (U. S. D. C. E. D. Pa. 1975), affirmed sub nom. *Franklin v. Fitzpatrick,* 428 U. S. 901[, 96 S. Ct. 3202, 49 L. Ed. 2d 1205] (1976). In *Danforth,* the statute provided criminal sanctions for performing an abortion during the first twelve weeks of pregnancy without a certification by the woman that she consented to the procedure and 'that her consent is informed and freely given and is not the result of coercion.' That part of the statute was held constitutional. The rationale of the three-judge district court was that the provision ensures that the woman retains control over the discretions of her consulting physician and that the provision was 'not burdensome or chilling,' manifesting a legitimate interest of the state 'that this important decision has in fact been made by the person constitutionally empowered to do so, and did not interpose 'the state or third parties in the decisionmaking

process.' The Supreme Court said that it did 'not disagree with the result reached by the District Court' and explained:

> 'The decision to abort, indeed, is an important and important and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent.'

"In *Fitzpatrick,* the three-judge district court approved an informed consent provision, which was buttressed by criminal sanctions, requiring the physician or a counselor to advise the pregnant woman (a) that there may be detrimental physical and psychological effects which are not foreseeable, (b) of possible alternatives to abortion, including childbirth and adoption, and (c) of the medical procedures to be used. The decision of that court was affirmed without opinion, the Supreme Court simply citing *Danforth.* The significance of *Fitzpatrick* is open to question because of the Supreme Court's failure to write an opinion and the observation of that court in *Danforth* in footnote 8 that:

> 'The appellants' vagueness argument centers on the word "informed." One might well wonder, offhand, just what "informed consent" of a patient is. The three Missouri federal judges who composed the three-judge District Court, however, were not concerned, and we are content to accept, as the meaning, the giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician to an undesirable and uncomfortable straitjacket in the practice of his profession.'

> ". . . [T]he segments of the Nebraska statute under attack here do impose criminal penalties for violation and do apply before viability of the fetus . . . The requirement[s of the Nebraska statute are] apparently not unconstitutional[, therefore,] if (1) compliance puts no articulable burden upon the decisionmaking process or (2) the burden is not for furtherance of the state's interest in the potential life of the fetus, and is tightly drawn to effectuate only some other legitimate interest of the state."

One decision of the Supreme Court of the United States has come down since the above statement: *Bellotti v. Baird,* supra. That decision, while possibly indicating some retreat from the stiff no-interference-during-the-first-trimester standard clearly adopted in *Roe v. Wade,* 410 U. S. at 164, 93 S. Ct. 705, addressed only the family and its role in society. In that respect, the *Bellotti v. Baird* decision appears limited to state legislation affecting the parents' role in the minor's abortion decision. In any event, it would take a clearer signal from the Supreme Court than that in *Bellotti v. Baird* to demonstrate a retreat from the strict standard announced previously in *Roe v. Wade* and its progeny.

The defendants contend:

> ". . . Where the obstacle does not impinge upon the woman's freedom to make a constitutionally protected decision, or if they merely make the physician[']s work more laborous [sic] or less independent without any impingement on the patient, *Whalen, supra,* 97 S. Ct. 879, the regulations are evaluated under a relaxed standard of scrutiny and the state is afforded broader power to encourage actions thought to be in the public interest. These regulations are subject to the 'less demanding test of rationality,' *Maher, supra,* 97 S. Ct. at 2385, and thus usually found constitutional. *Wynn v. Scott, supra.*"

Pretrial Brief of Defendants, pp. 13-14 Strictly read, this contention is correct. What the defendants contend, however, must not be confused with the facts of the case at bar. The major bones of contention in this case involve the requirements that a woman be exposed to certain information sufficient to constitute an "informed consent" within the terms of the statute and that she wait forty-eight hours after receiving that information before she may obtain an abortion. Absent an emergency situation, the informed-consent and waiting-period requirements would stand between the woman's desiring an abortion and obtaining one. This is a *direct obstacle* to abortion, and the *Maher v. Roe* decision specifically speaks to this:

> ". . . Although a state-created obstacle need not be absolute to be impermissible, . . . we have held that a requirement for a lawful abortion 'is not unconstitutional unless it unduly burdens the right to seek an abortion.' *Bellotti v. Baird,* 428 U. S. 132, 147 [96 S. Ct. 2857, 2866, 49 L. Ed. 2d 844] (1976). . . ."
> 432 U. S. at 473, 97 S. Ct. at 2382.

See, also *Maher v. Roe,* 432 U. S. at 475, 97 S. Ct. 2376.

One comment should be made about the evidence in relation to the standard of review before evaluating the specific sections. The Supreme Court's current position regarding interference with the doctor-patient relationship in the first trimester of pregnancy is very strict: the state may interpose few, if any, restrictions in that area. Compare *Roe v. Wade,* 410 U. S. at 163-164, 93 S. Ct. 705, with *Planned Parenthood of Missouri v. Danforth,* 428 U. S. at 67, n. 8, 96 S. Ct. at 284, n. 8 (the state may not "confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession"). The defendants contend that the Supreme Court, when making

these rulings, did not envision the possibility that they would create abortion factories churning out assmbly line abortions. The defendants argue that the Supreme Court has relied upon two assumed medical facts: (1) that there are relatively few complications, either short- or long-term, and almost universal safety in trimester abortions, and (2) that the physician-patient relationship is such that a woman seeking an abortion will openly confide in her physician, who in turn will probe her conscience and answer her questions. The defendants, in building an appellate record, have sought to refute these underlying assumptions by presenting extensive evidence on this subject. I make no findings of fact with respect to the greatest part of this evidence; that is not appropriate, it would seem, until the Supreme Court is ready to overrule *Roe v. Wade* or at least substantially limit it. I only make those findings of fact necessary to appraise this legislation pursuant to current constitutional standards. In this respect, it cannot be overemphasized that the challenged legislation does not differentiate with respect to trimesters of pregnancy. Thus, all of the legislation must be judged according to the most rigorous standard—that reserved for legislation touching upon the first trimester of pregnancy. See *Roe v. Wade,* supra; *Planned Parenthood of Missouri v. Danforth,* supra.

B.

The plaintiffs challenge the reporting section, 28-343, as well as its accompanying penalty section, 28-344, on the ground that it is void for vagueness. Section 28-343 provides that the attending physician shall complete a form, established by the Bureau of Vital Statistics, for "every abortion performed or prescribed." The form is to include

such information as the age of the pregnant woman, the type of procedure performed, any complications arising during that procedure, and the reasons for which the abortion was requested.[18] Section 28-343 lists the items to be

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18 "28-343. The Bureau of Vital Statistics, Department of Health, shall establish an abortion reporting form, which shall be used for the reporting of every abortion performed or prescribed in this state. Such form shall include only the following items:

(1) The age of the pregnant woman;

(2) The location of the facility where the abortion was performed;

(3) The type of procedure performed;

(4) Complications, if any;

(5) The name of the attending physician;

(6) The pregnant woman's obstetrical history regarding previous pregnancies, abortions, and live births;

(7) The stated reason or reasons for which the abortion was requested;

(8) The state of the pregnant woman's legal residence;

(9) The length and weight of the aborted child, when measurable; and

(10) Whether an emergency situation caused the physician to waive any of the requirements of section 28-327 or 28-333.

"The completed form shall be signed by the attending physician and sent to the Bureau of Vital Statistics within fifteen days after each reporting month. The completed form shall be an original, typed or written legibly in durable ink, and shall not be deemed complete unless the omission of any item of information required shall have been disclosed or satisfactorily accounted for. Carbon copies shall not be acceptable. The abortion reporting form required under this section shall not include the name of the person upon whom the abortion was performed. The abortion reporting form required under this section shall be confidential and shall not be revealed except upon the order of a court of competent jurisdiction in a civil or criminal proceeding."

included in the form and states that the form "shall include only" those items. The items relate to abortions which are "performed;" none of these items, however, relate to an abortion "prescribed." Interestingly, the two locations in the form required by the predecessor of L.B. 316 to contain information about prescribed abortions do not now require such information. In L.B. 316, the legislature deleted the words "or prescribed" from the present subsections numbered (2) and (3). I preliminarily enjoined § 28-343 only insofar as it requires the reporting of prescribed abortions, and reasoned as follows:

> ". . . Failure to eliminate the words 'or prescribed' at the beginning of the section, which declares that the reporting form 'shall be used for the reporting of every abortion performed *or prescribed* in this stage,' leaves the physician in a position of bein gcharged criminally for failing to report a 'prescribed' abortion, although the form mandated by the statute, which is to contain only certain information, allows no reporting of abortions prescribed but not performed. . . ." Memorandum of April 20, 1979

Little evidence was adduced at trial regarding the reporting section. The plaintiff physicians did testify to the effect that they would not know how to comply with the requirement of reporting prescribed abortions. Nothing, however, was adduced which would command a different response from the court on the matter. Section 28-343 will be permanently enjoined, insofar as it requires the reporting of "prescribed" abortions.

With respect to the remainder of the reporting section, the plaintiffs raise no serious questions. The information requested is not vague, excessive, or abusive. The state has the power to gather such information. See *Planned Parent-*

hood of Missouri v. Danforth, 428 U. S. at 80-81, 96 S. Ct. 2831. The remainder of § 28-343 is constitutional.

C.

Sections 28-326 (8), 28-327, 28-328, 28-333, and 28-334 contain the "informed consent" provisions of the Nebraska abortion law. Sections 28-328 and 28-334 provide criminal penalties for failure to comply with §§ 28-327 and 28-333 respectively; § 28-326 (8) defines informed consent. These provisions provide in relevant part:

§ 28-326 (8)

> "Informed consent shall mean a written statement, voluntarily entered into by the person upon whom an abortion is to be performed, whereby she specifically consents to such abortion. Such consent shall be deemed to be an informed consent only if it affirmatively appears in the written statement that the person upon whom the abortion is to be performed has been advised (a) of the reasonably possible medical and mental consequences resulting from an abortion, pregnancy, and childbirth, (b) of possible alternatives to abortion, including childbirth and adoption and including that there are agencies and services available to assist her to carry her pregnancy to a natural term, and (c) of the abortion procedures to be used. Such statement shall bear the signature of the person upon whom the abortion is to be performed and be signed by the attending physician;"

§ 28-327

> "No abortion shall be performed on any woman in the absence of an informed consent, except that an abortion may be performed if, in the sound medical judgment of the physician, an emergency presents imminent peril that substantially endangers the life of the

woman and the woman is unable to give informed consent."

§ 28-333

"No abortion shall be performed on any minor under the age of eighteen in the State of Nebraska without her informed consent unless an emergency situation exists.

"The informed consent by the minor shall be retained as part of the permanent record of the attending physician for no more than ten years. No person shall disclose any information contained in the informed consent, including the identity of the woman seeking the abortion, without the woman's written authorization or pursuant to an order issued by a court of competent jurisdiction. The Legislature hereby establishes a right of privacy in the State of Nebraska for a cause of action against persons making unauthorized disclosure in violation of this act."[19]

The plaintiffs contend that the informed-consent provisions are void for vagueness, violate the Equal Protection Clause, and unduly burden a woman's freedom to decide to terminate her pregnancy.

The defendants advance two arguments on behalf of the constitutionality of the informed-consent sections. First, they assert that the requirement of an informed consent does not impinge on the pregnant woman's decision-making process and therefore they only need show a rational interest supporting that requirement to sustain it. *Maher v. Roe, supra.* Second, they interpret the informed-consent requirement "only to require that the physician

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19 The portions of § 28-333 relating to parental consent have been omitted, as the court has previously granted summary judgment for the plaintiffs on those portions by order dated August 1, 1979.

not perform an abortion in the absence of an informed consent which is a written document voluntarily entered into in which the patient makes certain affirmative statements regarding the procedure." Defendants' Post-Trial Brief, p. 37. The defendants argue that this greatly reduces the burden imposed on the physician, because:

> ". . . If the document is voluntarily executed by the woman and contains the signature of the attending physician, the prosecutor cannot look further to determine if, in fact, she had been informed of the identified information."
>
> *Id.*

I have already addressed the second argument and rejected it in an opinion dated August 9, 1979, when it was made in support of the defendants' motion to dismiss on abstention grounds. The defendants' suggested interpretation would strain a plain reading of that section.[20] With

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20 In a memorandum and order dated August 9, 1979, I rejected the defendants' suggested interpretation of the section and reasoned as follows:

> "The defendants contend that the foregoing provisions may be construed by the Supreme Court of Nebraska so that a prima facie case for compliance would be made merely by the statement's bearing the signatures of both the person seeking the abortion and the attending physician. This construction, the defendants argue, would alleviate any burden on the abortion procedure, because the attending physician would not be obliged to give to the patient the required information or to ascertain that somebody else had given it to her. The defendants contend that the proposed construction would materially change the nature of the constitutional questions posed by the provisions and therefore this court should abstain, pending an interpretation by the Supreme Court of Nebraska.
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> * * *

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"While I grant that the proposed construction of the informed consent provisions would significantly affect the nature of the constitutional questions involved, I do not agree that the state statute is susceptible of the suggested construction. Such a construction would strain a plain reading of the statute. The provisions instruct that no physician may perform an abortion in the absence of an informed consent. A natural inference of this is that the physician must know that an informed consent has been executed. Unless a doctor or his agent informs the patient according to § 28-326 (8), I do not see how the physician could be assured that the statute has been complied with. One bit of advice required by the provision—that the patient be advised of the abortion procedures 'to be used'—reinforces this conclusion. Who else but the physician or one of the physician's agents would be in a position to tell the patient which abortion procedure is 'to be used' by the physician? Another requirement of the provision—that the consent be signed by both the patient and her physician—militates toward the same conclusion.

"The defendants assert that the dual signature requirement means no more than that the doctor must sign the form, and that he is in a position to accept a patient's word that she has received such advice. This alone would satisfy, at least to the extent of creating a prima facie case of compliance with, the statute. I see no indication of this, however, in the statute. The provision requires the signatures of the patient and the physician by the use of different language. While the informed consent statement must 'bear the signature' of the patient, it must 'be signed' by the physician. Although the use of different language to describe a similar or identical action often indicates an intent on the part of a legislature to differentiate these actions for some purpose, I do not see that use of such a differentiation could point toward the conclusion the defendants urge. At most it could indicate that the patient need not personally sign—she could cause someone else to do it for her, perhaps—but the physician must personally sign the form. That does not go to the question of whether the physician must personally give information to the patient or ascertain that someone else has done it adequately.

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respect to the first argument, I have indicated in section IIIA3 above that this is not an accurate characterization of the effect of the informed-consent requirement. Without an informed consent, the woman seeking an abortion could not obtain one. The informed-consent requirement thus places a direct obstacle between the woman and the abolition. It must be judged according to this effect.

The main thrust of the plaintiffs' vagueness argument centers on subsection (a) of § 28-326 (8). Subsection (a) requires that a woman seeking an abortion indicate that she has been advised of the "reasonably possible medical and mental consequences resulting from an abortion, pregnancy, and childbirth." The plaintiffs adduced testimony that indicated confusion as to the meaning of "reasonably possible" medical and mental consequences. The defendants put on contrary evidence. To the extent that a factual finding in this area provides a background for the legal resolution of this issue, I find the defendants' evidence more persuasive. Consequences which are "reasonably possible" are not an impermissibly vague concept. "Possible" consequences are those which have the potential for occurrence. "Reasonably" possible consequences are a subset of possible consequences limited by the bounds of reasonableness. Certainly the concept of "reasonableness" cannot be beyond comprehension. Both plaintiff physicians indicated that they understood the concept of reason-

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"Because the construction offered by the defendants would strain a plain reading of the provisions in question, I conclude that the provisions are not susceptible of this construction in order to warrant deference to the state courts under the abstention doctrine. The defendants' motion must therefore be denied."

ably possible consequences, but that when the idea was fortressed with criminal penalties, rather than civil penalties, they no longer understood its range. The introduction of different penalties does not, however, change the language. The severity of sanctions goes to burden, not vagueness. This phrase gives a person of ordinary intelligence fair notice as to the subject matter of the statute. It would not encourage arbitrary and erratic arrests and convictions. Moreover, the evidence produced on this subject confirms this conclusion.

The upshot of the plaintiff physicians' testimony was apparently meant to demonstrate that the "reasonably possible" standard would have a "chilling effect" on the exercise of their constitutional rights. One of the plaintiffs even testified that he would consider terminating his abortion practice if subsection (a) were upheld. The inhibition of the exercise of constitutionally protected rights, however, would not here be a result of "the uncertainty induced by the statute," as required by the *Colautti* court, 439 U. S. at 391, 99 S. Ct. at 683, but rather by fear of criminal penalties. Subsection (a) is neither vague nor overbroad.

The plaintiffs also argue that because experts disagree about the scope of "reasonably possible" consequences, this would permit arbitrary prosecutions according to whichever expert happened to advise the prosecutor. Rather than arbitrary prosecutions, however, the foregoing means that a specialist in obstetrics and gynecology would have to cover a range of disagreement in his profession regarding such consequences in order fully to ensure against criminal prosecution. Moreover, the question is not the

extent—whether great or small—of the range of disagreement; the question for vagueness purposes is whether that range can be ascertained. I find, as a matter of fact and law, that that range is ascertainable, and, incidentally, that that range is not as great as the plaintiffs suggest. No vagueness problems inhere.

In addition to their attack on the concept of "reasonably possible" consequences found in § 28-326 (8) (a), the plaintiffs make other vagueness challenges to the informed-consent provisions. They point to the discrepancy between the exceptions to the informed-consent requirement in §§ 28-333 and 28-327. Section 28-327, which prohibits the performing of an abortion on *any woman* in the absence of an informed consent, except those abortions where "an emergency presents imminent peril that substantially endangers the life of the woman and the woman is unable to give informed consent." Section 28-333, which pertains to the informed-consent requirement for *minors,* excepts those abortions in the context of an "emergency situation." Section 28-326 (7) defines "emergency situation" as follows:

> "Emergency situation shall mean a condition exists that in the sound medical judgment of the physician the abortion should be performed without delay so as not to adversely affect the best physical or mental health of the woman."

By their language, both §§ 28-327 and 28-333 apply to minors. Yet of these two emergency exceptions to the informed-consent requirement, that contained in § 28-327 is more restrictive than that contained in § 28-333. These conflicting exceptions to the informed-consent requirement bear the potential of placing the physician in an irrecon-

cilable dilemma, when he must determine which "emergency" standard governs the performing of an abortion sans informed consent. The appropriate way to solve this impermissibly vague situation is to enjoin one of these sections. Because § 28-327 speaks to all women and because the legislature obviously intended an informed-consent requirement to apply to all women, the enjoining of the enactment specifically addressing minors which has created this disjointed situation—§ 28-333—would better preserve the legislature's intent. Therefore, the first paragraph of § 28-333, as it now stands,[21] will be enjoined.

With respect to the second paragraph of § 28-333, the plaintiffs argue that the term "attending physician" is vague. I have previously rejected this argument; a plain reading of the section indicates that it is to mean the physician who physically performs the abortion.[22] In addition, the plaintiffs argue that the requirement that the informed consent "be retained as part of the permanent record" of the physician "for no more than ten years" is vague and contradictory. They ask:

> ". . . May the physician obtain the document and immediately destroy it? This would certainly not qualify as retention in the permanent records. May the physician obtain the document, place it in the permanent records and immediately remove and discard it? A literal reading would permit this conduct which render [sic] this statute meaningless."

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21 The parental consultation provision of § 28-333 has previously been enjoined. See footnote 3, supra.

22 *Womens Services v. Thone*, CV 79-L-85 (unreported memorandum U. S. D. C. Neb. April 20, 1979, p. 9).

Post-Trial Brief of Ladies Center, p. 18. The plaintiffs make a convincing argument on this point, and the first sentence of the second paragraph of § 28-333 will be stricken for vagueness.

Because the informed consent and parental consultation features of § 28-333 are unconstitutional, the concomitant penalty provision—§ 28-334—stands as an empty shell.[23]

The Equal Protection argument, once the standard of review is reduced to traditional rational-relation grounds, see section III*A*2 above, quickly fails. Only one example is necessary. One legitimate state interest surrounding the abortion decision is maternal health. That this is an interest of the state is obvious both from a reading of the declaration of purpose and from a reading of the informed consent section. That is not a sufficiently compelling interest to justify constitutionally a significant burden on the woman seeking an abortion prior to the second trimester of pregnancy, but it is nonetheless legitimate. A state may reasonably conclude that a requirement that a decision to abort be informed would promote the psychological health of the pregnant woman. Therefore, such an informed-consent requirement bears a rational relation to a legitimate state interest.

The informed-consent requirement does in significant part fail the substantive due process test. As a whole, it unduly burdens a woman's freedom to decide to terminate, and freedom to terminate, her pregnancy. Considering the

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23 The plaintiffs make other arguments regarding §§ 28-333 and 28-334. In light of my holding that the informed-consent requirement of § 28-333 must be enjoined, I need not address those arguments.

threat of criminal penalties for failure to comply with this provision, a physician or an assistant to a physician would unquestionably have to run a gamut of considerations to be assured that the subjects required by these sections to be covered had been covered. Testimony at trial showed that it would take several hours to "advise" (which means more than a cursory listing) a pregnant woman of all the "reasonably possible consequences" of abortion, pregnancy and childbirth. Specifics and detail need not be listed; they are abundantly found in the record. The punch of the statute is from the requirement that the patient be informed of the reasonably possible consequences not only of abortion, but also of pregnancy and childbirth. By refusing to allow the physician an opportunity to tailor this information to the patient, this provision also confines the physician in an unconstitutional straitjacket.

Moreover, the nature of the state's interest—presumably that of maternal health—is not compelling during the first trimester. However, even if that interest were compelling, subsection (a) even by itself is not narrowly drawn to effectuate only that interest. It surpasses the proper limits of "informed" when a woman seeking an abortion must learn about the myriad of medical and mental consequences reasonably resulting from pregnancy and childbirth.

Section 13 of L.B. 316 is a severability clause. It permits the severing of unconstitutional portions of a section without an effect on the remainder of that section.[24] Sub-

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24 "Sec. 13. If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration shall not affect the validity or constitutionality of the remaining portions thereof."

section (a) imposes an unconstitutional burden; the remainder of § 28-326 does not. Subsection (a) of § 28-326 (8) will be severed.

Subsections (b) and (c) of § 28-326 (8) do not unduly burden either a woman's decisionmaking process or her obtaining an abortion. *Planned Parenthood Association v. Fitzpatrick,* 401 F. Supp. 554 (U. S. D. C. E. D. Pa. 1975), aff'd *sub nom. Franklin v. Fitzpatrick,* 428 U. S. 901 (1976). The time required to convey the information is negligible and the state interest in having it conveyed—that the woman seeking an abortion be aware of the fundamental aspects of the procedure and the fundamental alternative—is tangible. This burden does not reach the degree of requiring any more than a tangible degree of state interest to justify it. Cf. *Planned Parenthood of Missouri v. Danforth,* supra. Moreover, the means of implementing that interest is not so broad as to cause concern.

Mention was made during trial of infanticide's being a possible alternative to abortion, the inference being that an informed consent pursuant to § 28-326 (8) (b) would include this measure. It is not conceivable, however, that the legislature intended for the woman seeking an abortion to be informed of infanticide. It is similarly not conceivable that a physician would be prosecuted for failing to so inform a patient. Such a chimera of counsel poses no genuine burden.

Severing subsection (a) from § 28-326 (8) is consistent with legislative intent. The overriding legislative intent expressed in L.B. 316 is to regulate abortion to the greatest extent within constitutional bounds.

Subsection (a) of § 28-326 (8) will be severed from the remainder of that section, will be declared unconstitutional, and will be permanently enjoined. Also, the first paragraph and the first sentence of the second paragraph of § 28-333 will be permanently enjoined. The remainder of § 28-326 (8) is constitutional, *Planned Parenthood Association v. Fitzpatrick,* supra, and it and the remaining informed-consent provisions will be upheld.

D.

The plaintiffs challenge the forty-eight-hour waiting period from the time the physician obtains an informed consent to the time he may perform an abortion, required by § 28-327[25] and enforced by § 28-328. They claim that the mandated waiting period both violates the Equal Protection Clause and imposes an undue burden on the woman's freedom to obtain an abortion. Because the waiting period does impose an undue burden, the Equal Protection challenge need not be reached.

The stipulation entered into between counsel and the testimony at trial document the increased cost which a woman from western Nebraska, for example, would incur in obtaining an abortion in Nebraska, were this requirement in effect. As the only abortion clinics in Nebraska are found in the Omaha area, the forty-eight-hour delay

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25 Section 28-327 provides in relevant part:

> "No abortion shall be performed on any woman without the passing of at least forty-eight hours between the expression of informed consent and the actual performance of the abortion unless, in the sound medical judgment of the physician, an emergency situation exists."

would cause her either to make one additional trip to this area or to stay in Omaha the duration of the waiting period. The obvious costs imposed by this waiting period are time, expense and delay. There was conflicting testimony about the amount of increase in risk to the pregnant woman's health caused by the delay. Even if the risk increase were small, it would amount to a secondary type of burden imposed by the waiting period. I find, as a matter of fact, however, the increased risk to be substantial.

The state interest, it seems, is that the woman seeking in abortion should make a thoughtful decision after receiving the information required by the informed consent and more fully realizing her capacity to obtain an abortion. While this may be legitimate, it is not sufficiently compelling to justify the burdens imposed by this direct obstacle to abortion. It must be recalled that this waiting period attaches to the first trimester, the trimester for which the most exacting judicial scrutiny applies. See *Roe v. Wade*, 410 U. S. at 164, 93 S. Ct. 705. For the foregoing reasons, the waiting-period requirement must be permanently enjoined.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV78-L-289

CV79-L-85

CV79-L-100

WOMENS SERVICES, et al.,

Plaintiffs,

vs.

CHARLES THONE, et al.,

Defendants.

MEMORANDUM AND ORDER ON MOTION TO INTERVENE, MOTION FOR RECONSIDERATION AND MOTIONS FOR SUMMARY JUDGMENT

(Filed August 1, 1979)

The plaintiffs have filed a motion to amend the complaint by deleting their challenge to the constitutionality of §§ 28-329 to 28-332, inclusive,[1] which deal with the issues of viability and fetal care. The plaintiffs have also filed motions for partial summary judgment and reconsideration with respect to § 28-336, as well as a motion for partial summary judgment and permanent injunction with

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1 In the complaints the plaintiffs challenge §§ 28-325 to 28-334, inclusive, 28-336, and 28-342 to 28-345, inclusive. The plaintiffs seek to amend their complaints to challenge §§ 28-325 to 28-328, inclusive, 28-333 and 28-334, 28-336, and 28-342 to 28-345, inclusive.

respect to § 28-333. The defendants have filed a cross-motion for partial summary judgment with respect to §§ 28-333 and 28-336. Additionally, the Nebraska Religious Coalition for Abortion Rights and Audrey K. (Kappie) Weber have sought to intervene pursuant to Rule 24 (b) of the Federal Rules of Civil Procedure.

A district court may in its discretion authorize permissive intervention under Rule 24 (b) upon timely application to the court and a showing that the applicant's claim or defense and the main action have a common question of law or fact. The applicants at this late date—less than two weeks from the scheduled trial date—have not made a timely request to intervene. Most depositions have been taken and many motions have been ruled on. The bulk of trial preparation has taken place and through this, the defendants have been able to anticipate and prepare for the plaintiffs' case. Permitting the addition of a new plaintiff now would have the undue likelihood of lengthening and complicating the trial, as well as prejudicing the defendants. Discovery is all but complete, and as a matter of trial convenience the motion to intervene must be denied. See *Honeywell, Inc. v. Sperry Rand Corp.*, 54 F. R. D. 593, 595 (U. S. D. C. Minn. 1971), aff'd sub nom *Iowa State University Research Foundation, Inc. v. Honeywell, Inc.*, 459 F. 2d 447 (C. A. 8th Cir. 1972); 3B *Moore's Federal Practice* ¶ 24.13, at 24-521 to 24-254 (2d ed. 1948).

By letter dated July 20, 1979, the defendants informed the court that they have no objection to the plaintiffs' motion to amend. Pursuant to Rule 15 (a) of the Federal Rules of Civil Procedure, this motion will be granted. See, e. g., *Foman v. Davis*, 371 U. S. 178, 182 (1962).

Section 28-333 of Legislative Bill 316 prohibits the performing of an abortion on any minor under the age of eighteen unless the minor has made an informed consent and a written statement of consultation; in the statement of consultation the minor must indicate that she has consulted with her parent or guardian[2] about the contemplated abortion. The plaintiffs' brief in support of their motion for partial summary judgment and permanent injunction attacks the parental consultation requirement primarily on the basis of a recently decided case, *Bellotti v. Baird*, 47 U. S. L. W. 4969 (1979). Although the plaintiffs' motion seeks an injunction of § 28-333, which might be taken as an attack on both segments of that section, the informed consent requirement has not been assailed in the brief, and the *Bellotti* decision does not specifically address the constitutionality of such a requirement. As to this motion for partial summary judgment, then, I address only the parental consultation requirement embodied in § 28-333. The defendants in their letter to the court dated July 20, 1979, agreed that the parental consultation issue is controlled by the *Bellotti* case.

In *Bellotti v. Baird* the Supreme Court of the United States addressed the constitutionality of a Massachusetts statute which required parental consultation or notice in every instance where a parent was available before a nonemergency abortion could be obtained. 47 U. S. L. W. at

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2 It is not clear whether § 28-333 requires consultation with only one parent or with both parents. *Womens Services v. Thone*, CV 79-L-85 (unreported memorandum, p. 8, U. S. D. C. Neb. 1979). It is clear, after the decision of *Bellotti v. Baird*, 47 U. S. L. W. 4969 (1979), however, that this ambiguity will not affect the constitutional status of the section.

4975. Mr. Justice Powell, who delivered the opinion of the court, made clear the point that such a notice requirement—an absolute obstacle to the obtaining of an abortion—could not withstand constitutional scrutiny:

> ". . . [U]nder state regulation such as that undertaken by Massachusetts, every minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents."
>
> *Id.*

If a minor can convince a court that she is either sufficiently mature to make a competent decision or that an abortion would be in her best interest, then a state may not prohibit her obtaining an abortion on the ground that she has not consulted or notified her parents.

The foregoing discussion of the *Bellotti* decision requires that the segment of § 28-333 which prohibits a nonemergency abortion unless the minor consults with her parent or guardian must be struck down. It poses an absolute obstacle which might, in some instances, unduly burden a minor's constitutional right to procure an abortion. It leaves no alternative whereby the minor could go directly to a court without parental consultation.

Section 28-336 provides that "[t]he performing of an abortion by using anything other than accepted medical procedures is a Class IV felony." The plaintiffs contend in their motion for reconsideration, filing 44 in CV78-L-289, that this section provides both a rule and a penalty for violation of the rule, thereby providing its own substantive framework as a context within which to evaluate

its constitutionality. This is correct, and I shall grant the motion for reconsideration.

The plaintiffs argue in their motion for partial summary judgment with respect to § 28-336 that the phrase "accepted medical procedure" renders the section void for vagueness. Significantly, the legislature has furnished no guidelines for the interpretation of this phrase. The plaintiffs assert that the section fails to give fair warning of the nature of the conduct which will be considered criminal, that it will grant prosecutors and jurors excessive discretion which will allow arbitrary and discriminatory prosecutions, and that it will inhibit the exercise of constitutionally protected rights. They point out that the section does not elaborate:

> ". . . whether a particular procedure at a particular time should be judged by neighborhood or community standards, or by national standards, or by the standards of a medical speciality or subspeciality, or, indeed, whether very advanced or experimentally promising procedures might be construed to be 'accepted.'"
> Plaintiffs' brief, pp. 4-5

Due to the faults in § 28-336 pointed out by the plaintiffs and mentioned above, this section both fails to give an ordinary person fair notice of what conduct is prohibited and encourages arbitrary and erratic arrests and convictions. The section must be struck down as being void for vagueness. *Colautti v. Franklin,* 47 U. S. L. W. 4094, 4097 (1979).

IT THEREFORE HEREBY IS ORDERED:

1. That the motions to intervene, filing 74 in CV79-L-85 and filing 61 in CV79-L-100, are denied;

2. That the plaintiffs' motions for leave to amend, filings 45 and 46 in CV78-L-289, filings 68 and 69 in CV79-L-85, and filings 55 and 56 in CV79-L-100, are granted;

3. That the plaintiffs' motions for partial summary judgment with respect to § 28-333, filing 50 in CV79-L-100 and filing 59 in CV79-L-85, are granted insofar as they relate to the parental consultation requirements of that section;

4. That the plaintiffs' motion for reconsideration, filing 44 in CV78-L-289, is granted;

5. That the plaintiffs' motions for partial summary judgment with respect to § 28-336, filing 43 in CV78-L-289 and filing 64 in CV79-L-85, are granted; and

6. That the cross-motions for partial summary judgment with respect to §§ 28-333 and 28-336, filing 48 in CV78-L-289, filing 71 in CV79-L-85, and filing 58 in CV79-L-100, are denied.

Dated August 1, 1979.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV 78-L-289

CV 79-L-85

CV 79-L-100

WOMENS SERVICES, et al.,

Plaintiffs,

vs.

CHARLES THONE, et al.,

Defendants.

(Filed August 9, 1979)

MEMORANDUM AND ORDER
ON ABSTENTION

Pending is the motion of the defendants to dismiss, based on the abstention doctrine (filing 10 in CV79-L-85). At the pretrial conference counsel for the defendants called attention to the application of the abstention doctrine to the informed consent provisions of Legislative Bill 316, §§ 28-326(8) and 28-327. Those provisions read:

§ 28-326(8)

"Informed consent shall mean a written statement, voluntarily entered into by the person upon whom an abortion is to be performed, whereby she specifically consents to such abortion. Such consent shall be deemed to be an informed consent only if it affirmatively appears in the written statement that the person upon whom the abortion is to be performed has been advised (a) of the consequences resulting

from an abortion, pregnancy, and childbirth, (b) of possible alternatives to abortion, including childbirth and adoption and including that there are agencies and services available to assist her to carry her pregnancy to a natural term, and (c) of the abortion procedures to be used. Such statement shall bear the signature of the person upon whom the abortion is to be performed and be signed by the attending physician;"

§ 28-327

"No abortion shall be performed on any woman in the absence of an informed consent . . . "

The defendants contend that the foregoing provisions may be construed by the Supreme Court of Nebraska so that a prima facie case for compliance would be made merely by the statement's bearing the signatures of both the person seeking the abortion and the attending physician. This construction, the defendants argue, *would alleviate any burden on the abortion procedure,* because the attending physician *would not be obliged to give to the patient the required information* or to ascertain that somebody else had given it to her. The defendants contend *that the proposed construction would materially change the nature of the constitutional questions* posed by the provisions and therefore this court should abstain, pending an interpretation by the Supreme Court of Nebraska.

The abstention doctrine requires a federal court to withhold consideration of the constitutionality of an unconstrued state statute where that statute is "susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the

nature of the problem.'" *Bellotti v. Baird*, 428 U. S. 132, 147 (1976).

While I grant that the proposed construction of the informed consent provisions would significantly affect the nature of the constitutional questions involved, I do not agree that the state statute is susceptible of the suggested construction. Such a construction would strain a plain reading of the statute. The provisions instruct that no physician may perform an abortion in the absence of an informed consent. A natural inference of this is that the physician must know that an informed consent has been executed. Unless a doctor or his agent informs the patient according to § 28-326(8), I do not see how the physician could be assured that the statute has been complied with. One bit of advice required by the provision —that the patient be advised of the abortion procedures "to be used"—reinforces this conclusion. Who else but the physician or one of the physician's agents would be in a position to tell the patient which abortion procedure is "to be used" by the physician? Another requirement of the provision—that the consent be signed by both the patient and her physician—militates toward the same conclusion.

The defendants assert that the dual signature requirement means no more than that the doctor must sign the form, and that he is in a position to accept a patient's word that she has received such advise. This alone would satisfy, at least to the extent of creating a prima facie case of compliance with, the statute. I see no indication of this, however, in the statute. The provision requires the signatures of the patient and the physician by the use

of different language. While the informed consent statement must "bear the signature" of the patient, it must "be signed" by the physician. Although the use of different language to describe a similar or identical action often indicates an intent on the part of a legislature to differentiate these actions for some purpose, I do not see that use of such a differentiation could point toward the conclusion the defendants urge. At most it could indicate that the patient need not personally sign—she could cause someone else to do it for her, perhaps—but the physician must personally sign the form. That does not go to the question of whether the physician must personally give information to the patient or ascertain that someone else has done it adequately.

Because the construction offered by the defendants would strain a plain reading of the provisions in question, I conclude that the provisions are not susceptible of this construction in order to warrant deference to the state courts under the abstention doctrine. The defendants' motion must therefore be denied.

I mention one other point which causes me concern. The provisions in question are enforced with criminal sanctions, and no action is presently pending in which the provisions could be interpreted. There being no guarantee of such an interpretative proceeding prior to a criminal action to enforce these provisions, a physician who accepted the defendants' construction might find out to his serious disadvantage that this construction was incorrect. Criminal proceedings are an exceedingly severe means of testing out what appears to be a highly improbable construction of a statute, and no person should be subjected to that risk.

If a procedure existed by which I could certify in this action to the Supreme Court of Nebraska the question of the correct interpretation of the statutory language, I could well take advantage of it here, but there has been authorized by the Nebraska legislature no such procedure.

IT THEREFORE HEREBY IS ORDERED that the defendants' motion to dismiss based on the abstention doctrine, filing 10 in CV79-L-85, is denied.

Dated August 9, 1979.

By the Court

Warren K. Urbom
Chief Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 80-1192 and 80-1193

No. 80-1192

Womens Services, P. C., a Nebraska Professional Corporation and William G. Orr, M. D.,

Elizabeth F.,

Appellant,

vs.

Charles Thone, Governor of the State of Nebraska; Paul L. Douglas, Attorney General for the State of Nebraska and Donald L. Knowles, County Attorney for the County of Douglas, State of Nebraska;
Marilyn A. Schneider,

Appellees,

• • • •

Ladies Center, Nebraska, Inc., a corporation; John M. Epp, M. D.,

Betty Roe, by her next friend Barbara Gaither and Elizabeth F.,

Appellants,

vs.

Charles Thone, Governor for the State of Nebraska; Paul L. Douglas, Attorney General for the State of Nebraska and Donald L. Knowles, County Attorney for the County of Douglas, State of Nebraska;
Marilyn A. Schneider,

Appellees.

No. 80-1193

Womens Services, P.C., a Nebraska Professional Corporation; G. William Orr, M. D.;
Elizabeth F.,

Appellees,

vs.

Charles Thone, Governor of the State of Nebraska; Paul L. Douglas, Attorney General for the State of Nebraska and Donald L. Knowles, County Attorney for the County of Douglas, State of Nebraska,

Appellants,

Marilyn A. Schneider,

• • • •

Ladies Center, Nebraska, Inc., a corporation; M. John Epp, M. D.; Betty Roe by her next friend Barbara Gaither and Elizabeth F.,

Appellees,

vs.

Charles Thone, Governor of the State of Nebraska; Paul L. Douglas, Attorney General for the State of Nebraska and Donald L. Knowles, County Attorney for the County of Douglas, State of Nebraska,

Appellants,

Marilyn A. Schneider,

• • • •

Womens Services, P.C., a Nebraska Professional Corporation and G. William Orr, M.D.,

Appellees,

vs.

Charles Thone, Governor of the State of Nebraska; Paul L. Douglas, Attorney General for the State of Nebraska and Donald L. Knowles, County Attorney for the County of Douglas, State of Nebraska,

Appellants.

Appeals from the United States District Court
for the District of Nebraska

Submitted: October 13, 1980

Filed: December 8, 1980

Before ROSS, Circuit Judge, GIBSON, Senior Circuit Judge, and SACHS, District Judge.*

PER CURIAM.

These appeals challenge the findings of the district court[1] regarding the constitutionality of various portions of a Nebraska abortion regulation law, NEB REV. STAT. § 28-325 *et seq.* We affirm the judgment of the district court primarily on the basis of the district court decision. However, because intervening cases have been filed by the Supreme Court, and for other reasons which will later be made obvious, we comment briefly on each aspect of the decision.

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*The Honorable HOWARD F. SACHS, United States District Judge for the Western District of Missouri; sitting by designation.

1 The Honorable WARREN K. URBOM, Chief Judge, United States District Court for the District of Nebraska.

The opinion of the district court, *Womens Services, P.C. v. Thone,* 483 F. Supp. 1022 (D. Neb. 1979), addressed first the issue of whether certain plaintiffs had standing to challenge the legislation. Judge Urbom found that plaintiff Ladies Center had achieved standing because the statute imposed potential criminal liability as accomplices on Ladies Center. *Id.* at 1030-31. The district court held that plaintiff Betty Roe lacked standing because although she was pregnant when the legislation was enacted, she had procured an abortion before the law's effective date. *Id.* at 1031.

Next, the district court reviewed the plaintiffs' claim that the legislation violated the Establishment and Free Exercise Clauses of the first amendment. Judge Urbom found that the idea that life begins at conception was a motivating principal of the legislation, but this idea was "as capable of being labeled philosophical as religious * * * ." *Id.* at 1036. In finding no establishment clause violation, Judge Urbom applied the three-part test of *Committee for Public Education v. Nyquist,* 413 U. S. 756 (1973). The district court found that the legislation: (1) "reflect[ed] a clearly secular legislative purpose"; (2) had "a primary effect that neither advances nor inhibits religion"; and (3) "avoid[ed] excessive government entanglement with religion." *Nyquist, supra,* 413 U. S. at 773.

Judge Urbom also rejected plaintiffs' free exercise claim, noting there was "no evidence to indicate that a woman's obtaining of an abortion without the regulation * * * would constitute a fundamental tenet of any re-

ligion." *Womens Services, P.C. v. Thone, supra,* 483 F. Supp. at 1040.

Finally, the district court delt with plaintiffs' contentions that various provisions of the law (1) unduly burden a woman's right to decide to terminate her pregnancy; (2) were void for vagueness; and (3) violated the Equal Protection Clause. The findings which concern the parties in these appeals are those in regard to an informed consent provision, NEB. REV. STAT. § 28-326(8)(a)[2] and a 48-hour waiting period provision, NEB REV. STAT. § 28-327.[3] In analyzing these provisions, Judge Urbom held that the equal protection claim required only a rational relationship test but the substantive due process claim would require "the most rigorous standard" of review. *Id.* at 1044. Applying these standards, the district court found that the informed consent provision was rationally related to a legitimate state interest but failed the substantive due process test. *Id.* at 1048-49. Judge Urbom noted that the state's interest was not compelling during the first trimester of pregnancy and the provision unduly burdens a woman's freedom to decide to terminate her pregnancy. *Id.* at 1049. The 48-hour waiting period

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2 NEB. REV. STAT. § 28-326 (8) (a) requires that "the person upon whom the abortion is to be performed [be] advised (a) of the reasonably possible medical and mental consequences resulting from an abortion, pregnancy, and childbirth."

3 NEB. REV. STAT. § 28-327, in part provides:

> No abortion shall be performed on any woman without the passing of at least forty-eight hours between the expression of informed consent and the actual performance of the abortion unless, in the sound medical judgment of the physician, an emergency situation exists.

was also found to unduly burden a woman's freedom and the state's interest in a "thoughtful decision" was not sufficiently compelling. *Id.* at 1050.

The parties, on appeal, also dispute two findings of the district court made during the litigation. By order dated August 1, 1979, the district court granted plaintiffs' motion for partial summary judgment, finding unconstitutional a parental consultation requirement, NEB. REV. STAT. § 28-333. On August 9, 1979, the district court denied defendants' motion to dismiss which was based on the abstention doctrine. Judge Urbom found that defendants' suggested construction of the informed consent provisions, NEB. REV. STAT. §§ 28-326(8) and 28-327, "would strain a plain reading of the statute." *Women's Services, P.C. v. Thone,* No. CV-78-289, mem. op. at 2 (D. Neb. Aug. 9, 1979).

Also raised as error on appeal is the decision of the district court to strike the testimony of Senator Fowler.

Appeal 80-1192

Appellants, Womens Services, P.C., et al., argue that the district court erred in finding that the legislation did not violate the Establishment Clause and the Free Exercises Clause. We disagree.

The Supreme Court recently stated in connection with similar contentions concerning the Hyde Amendment that:

> a legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive governmental entanglement with religion.

Harris v. McRae, — U.S. —, 48 U.S.L.W. 4941, 4947 (U.S. June 30, 1980), citing *Committee for Public Education and Religious Liberty v. Regan,* 444 U.S. 646, 653 (1980). The district court applied the proper test to the legislation in question and correctly found no violation of the Establishment Clause. As the Supreme Court also noted in *Harris v. McRae,* "a statute does [not] violate the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.'" *Harris v. McRae, supra,* — U.S. —, 48 U.S.L.W. at 4947, citing *McGowan v. Maryland,* 366 U.S. 420, 442 (1961).

Judge Urbom also found that the statute did not violate the Free Exercise Clause. In that regard we note that "'it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him [as an individual] in the practice of his religion.'" *Harris v. McRae, supra,* — U.S. at —, 48 U.S.L.W. at 4947, citing *Abington School District v. Schempp,* 374 U.S. 203, 223 (1963). *See also Board of Education v. Allen,* 392 U.S. 236, 249 (1968). Although the proffered testimony of individual women addressed the coercive effect of the statute on the decision to abort and one of the plaintiffs did attempt to relate that decision to her religion, the testimony failed to establish that the decision to abort was "fundamental to" their faith. *Wisconsin v. Yoder,* 406 U.S. 205, 216 (1972).

Additionally, we find no abuse of discretion in Judge Urbom's decision to strike the testimony of Senator Fowler. We also affirm the finding that Betty Roe lacked standing to challenge the legislation for the reasons stated in Judge Urbom's decision.

Appeal 80-1193

Appellants, Charles Thone, et al., allege that the district court erred in holding various provisions of the Nebraska law unconstitutional. Appellants challenge the district court's findings as to § 28-326(8) (a) (defining informed consent as requiring that the women be advised "of the reasonably possible medical and mental consequences resulting from an abortion, pregnancy, and childbirth") and § 28-327 (requiring a 48-hour waiting period "between the expression of informed consent and the actual performance of the abortion * * * .").

Under a substantive due process analysis, Judge Urbom found that the interests of the state were not sufficiently compelling to justify placing such undue burdens, as these, on a woman's freedom to decide whether to terminate her pregnancy. Specifically, Judge Urbom found that it would take "several hours" to advise a woman of the "myriad" of medical and mental consequences resulting from an abortion, pregnancy, and childbirth. Regarding the 48-hour waiting period, Judge Urbom noted that the only abortion clinics in Nebraska are in the Omaha area and, therefore, the waiting period would increase the expense and time necessary for an abortion, especially for women from western Nebraska. Judge Urbom also held that the delay caused a "substantial" increase in risk to the pregnant woman's health.

We agree that legislation which directly interferes with a woman's fundamental right to decide whether to terminate her pregnancy is subject to strict scrutiny under a substantive due process analysis. *Charles v. Carey,* 627 F. 2d 772, 776-78 (7th Cir. 1980). Although not denoting

the standard as "strict scrutiny," the district court, in ruling on these two sections, applied "the most rigorous standard" to them. Thus, Judge Urbom's analysis, in effect, applied a strict scrutiny standard and we agree with his analysis in applying such standard of review. Because the cited subsections fail under a substantive due process analysis, we make no determination as to whether strict scrutiny should also be applied to the legislation under an equal protection analysis.

Next, appellants urge that the district court erred in holding the parental consultation portion of § 28-333 unconstitutional. Judge Urbom found that the provision could not stand based on the requirements stated in *Bellotti v. Baird,* 443 U.S. 622 (1979(*Bellotti II*). We agree that *Bellotti II* is applicable to the provision in question and affirm Judge Urbom's findings based on his order of August 1, 1979.

We also reject appellants' arguments that the district court should have abstained from review of the informed consent portion, §§ 28-326(8) and 28-327, and that Ladies Center, Inc. lacked standing in this action.

Finally, appellants contend that Judge Urbom could have severed some of the language with § 28-326(8)(a) which required that a woman be advised of the "reasonably possible medical and mental consequences resulting from an abortion, pregnancy, and childbirth." This argument has no merit. Even assuming that the language "pregnancy and childbirth" was added to the legislation at the request of the law's opponents, the fact remains that the Nebraska Legislature passed the law including such language. And we would be reluctant to sever lan-

guage which is so inseparably intertwined within a subsection of the law.

The opinion of the district court is affirmed for the reasons indicated herein. Each party shall pay its own costs.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX E

28-325. *Abortion; declaration of purpose.* The Legislature hereby finds and declares:

(1) That the following provisions were motivated by the legislative intrusion of the United States Supreme Court by virtue of its decision removing the protection afforded the unborn. Sections 28-325 to 28-345 are in no way to be construed as legislatively encouraging abortions at any stage of unborn human development, but is rather an expression of the will of the people of the State of Nebraska and the members of the Legislature to provide protection for the life of the unborn child whenever possible;

(2) That the members of the Legislature expressly deplore the destruction of the unborn human lives which has and will occur in Nebraska as a consequence of the United States Supreme Court's decision on abortion of January 22, 1973;

(3) That it is in the interest of the people of the State of Nebraska that every precaution be taken to insure the protection of every viable unborn child being aborted, and every precaution be taken to provide life-supportive procedures to insure the unborn child its continued life after its abortion;

(4) That currently this state is prevented from providing adequate legal remedies to protect the life, health, and welfare of pregnant women and unborn human life; and

(5) That it is the interest of the people of the State of Nebraska to maintain accurate statistical data to aid in providing proper maternal health regulations and education.

Source: Laws 1977, LB 38, § 40.

28-326. *Terms, defined.* As used in sections 28-325 to 28-345, unless the context otherwise requires:

(1) Abortion shall mean an act, procedure, device, or prescription administered to a woman known by the person so administering to be pregnant and performed with the intent and result of producing the premature expulsion, removal, or termination of the human life within the womb of the pregnant woman, except that in cases in which the unborn child's viability is threatened by continuation of the pregnancy, early delivery after viability shall not be construed as an abortion for the purposes of sections 28-325 to 28-345;

(2) Hospital shall mean those institutions licensed by the State Board of Health pursuant to sections 71-2017 to 71-2029;

(3) Physician shall mean any person licensed to practice medicine in this state as provided in sections 71-102 to 71-110;

(4) Pregnant shall mean that condition of a woman who has unborn human life within her as the result of conception;

(5) Conception shall mean the fecundation of the ovum by the spermatozoa;

(6) Viability shall mean that stage of human development when the unborn child is potentially able to live outside the womb of the mother by natural or artificial means;

(7) Emergency situation shall mean a condition exists that in the sound medical judgment of the physician the abortion should be performed without delay so as not to adversely affect the best physical or mental health of the woman;

(8) Informed consent shall mean a written statement, voluntarily entered into by the person upon whom an abortion is to be performed, whereby she specifically consents to such abortion. Such consent shall be deemed to be an informed consent only if it affirmatively appears in the written statement that the person upon whom the abortion is to be performed has been advised (a) of the reasonably possible medical and mental consequences resulting from an abortion, pregnancy, and childbirth, (b) of possible alternatives to abortion, including childbirth and adoption and including that there are agencies and services available to assist her to carry her pregnancy to a natural term, and (c) of the abortion precedures to be

used. Such statement shall bear the signature of the person upon whom the abortion is to be performed and be signed by the attending physician; and

(9) The word signature includes the mark of a person unable to write her name; a mark shall have the same effect as a signature when the name is written by some other person and the mark is made near thereto by the person unable to write her name.

Source: Laws 1977, LB 38, § 41; Laws 1979, LB 316, §1.

28-327. *Abortion; informed consent required; waiting period; exception.* No abortion shall be performed on any woman in the absence of an informed consent, except that an abortion may be performed if, in the sound medical judgment of the physician, an emergency presents imminent peril that substantially endangers the life of the woman and the woman is unable to give informed consent.

No abortion shall be performed on any woman without the passing of at least forty-eight hours between the expression of informed consent and the actual performance of the abortion unless, in the sound medical judgment of the physician, an emergency situation exists.

Source: Laws 1977, LB 38, § 42; Laws 1979 LB 316, § 2.

28-328. *Failure to inform; violation; penalty.* Violation of section 28-327 is a Class II misdemeanor.

Source: Laws 1977, LB 38, § 43.

28-329. *Abortion; when not to be performed.* No abortion shall be performed after the time at which, in

the sound medical judgment of the attending physician, the unborn child clearly appears to have reached viability, except when necessary to preserve the woman from an imminent peril that substantially endangers her life or health.

Source: Laws 1977, LB 38, § 44; Laws 1979, LB 316, § 3.

28-330. *Abortion procedure; protection of viable unborn child.* In any abortion performed pursuant to section 28-329, all reasonable precautions, in accord with the sound medical judgment of the attending physician and compatible with preserving the woman from an imminent peril that substantially endangers her life or health, shall be taken to insure the protection of the viable, unborn child.

Source: Laws 1977, LB 38, § 45; Laws 1979, LB 316, § 4.

28-331. *Care and treatment of child aborted.* All reasonable steps, *in accord* with the sound medical judgment of the attending physician, shall be employed in the treatment of any child aborted alive with any chance of survival.

Source: Laws 1977, LB 38, § 46; Laws 1979, LB 316, § 5.

28-332. *Violation; penalty.* Violation of section 28-329, 28-330, or 28-331 is a Class IV felony.

Source: Laws 1977, LB 38, § 47.

28-333. *Abortion; minor under eighteen; informed consent and consultation requirement; record; confiden-*

tial; right of privacy. No abortion shall be performed on any minor under the age of eighteen in the State of Nebraska without her informed consent and a written statement by her indicating that she has consulted with her parent or guardian concerning the performance of an abortion, unless an emergency situation exists. The statement of consultation shall be in the following form:

I, _____, a minor have advised my parent(s) or guardian that I am pregnant and contemplating an abortion and have consulted with them concerning the contemplated abortion.

Date _____

Signed _____

The informed consent by the minor and the statement of consultation with the parent or guardian shall be retained as part of the permanent record of the attending physician as evidence of the requirement of consultation for no more than ten years. No person shall disclose any information contained in the informed consent or the statement of consultation, including the identity of the woman seeking the abortion, without the woman's written authorization or pursuant to an order issued by a court of competent jurisdiction. The Legislature hereby establishes a right of privacy in the State of Nebraska for a cause of action against persons making unauthorized disclosure in violation of this act.

Source: Laws 1977, LB 38, § 48; Laws 1978, LB 748, § 6; Laws 1979, LB 316, § 6.

28-334. *Abortion performed without informed consent or consultation; penalty.* The performing of an abor-

tion without the informed consent or written statement required in section 28-333 when the attending physician knew or should have known that the woman upon whom the abortion was performed was under the age of eighteen or was not married or the unauthorized disclosure of information protected under section 28-333 is a Class I misdemeanor.

Source: Laws 1977, LB 38, § 49; Laws 1979, LB 316, § 7.

28-335. *Abortion by other than licensed physician; penalty.* The performing of an abortion by any person other than a licensed physician is a Class IV felony.

Source: Laws 1977, LB 38, § 50.

28-336. *Abortion by other than accepted medical procedures; penalty.* The performing of an abortion by using anything other than accepted medical procedures is a Class IV felony.

Source: Laws 1977, LB 38, § 51.

28-337. *Hospital, clinic, institution; not required to admit patient for abortion.* No hospital, clinic, institution, or other facility in this state shall be required to admit any patient for the purpose of performing an abortion nor required to allow the performance of an abortion therein, but the hospital, clinic, institution, or other facility shall inform the patient of its policy not to participate in abortion procedures. No cause of action shall arise against any hospital, clinic, institution, or other facility for refusing to perform or allow an abortion.

Source: Laws 1977, LB 38, § 52.

28-338. *No person required to perform an abortion; no liability for refusal.* No person shall be required to perform or participate in any abortion, and the refusal of any person to participate in an abortion shall not be a basis for civil liability to any person. No hospital, governing board, or any other person, firm, association, or group shall terminate the employment or alter the position of, prevent or impair the practice or occupation of, or impose any other sanction or otherwise discriminate against any person who refuses to participate in an abortion.

Source: Laws 1977, LB 38, § 53.

28-339. *Discrimination against person refusing to participate in an abortion; violation; penalty.* Any violation of section 28-338 is a Class II misdemeanor.

Source: Laws 1977, LB 38, § 54.

28-340. *Discrimination against person refusing to participate in an abortion; damages.* Any person whose employment or position has been in any way altered, impaired, or terminated in violation of sections 28-325 to 28-345 may sue in the district court for all consequential damages, lost wages, reasonable attorney's fees incurred, and the cost of litigation.

Source: Laws 1977, LB 38, § 55.

28-341. *Discrimination against person refusing to participate; injunctive relief.* Any person whose employment or position has in any way been altered, impaired,

or terminated because of his refusal to participate in an abortion shall have the right to injunctive relief, including temporary relief, pending trial upon showing of an emergency, in the district court, in accordance with the statutes, rules, and practices applicable in other similar cases.

Source: Laws 1977, LB 38, § 56.

28-342. *Aborted child; sell, transfer, distribute, give away violation; penalty.* The knowing, willful, or intentional sale, transfer, distribution, or giving away of any live or viable aborted child for any form of experimentation is a Class III felony. The knowing, willful, or intentional consenting to, aiding, or abetting of any such sale, transfer, distribution, or other unlawful disposition of an aborted child is a Class III felony. This section shall not prohibit or regulate diagnostic or remedial procedures the purpose of which is to preserve the life or health of the aborted child or the mother.

Source: Laws 1977, LB 38, § 57; Laws 1979, LB 316, § 8.

28-343. *Bureau of Vital Statistics; abortion reporting form; items included; confidential.* The Bureau of Vital Statistics, Department of Health, shall establish an abortion reporting form, which shall be used for the reporting of every abortion performed or prescribed in this state. Such form shall include only the following items:

(1) The age of the pregnant woman;

(2) The location of the facility where the abortion was performed

(3) The type of procedure performed;

(4) Complications, if any;

(5) The name of the attending physician;

(6) The pregnant woman's obstetrical history regarding previous pregnancies, abortions, and live births;

(7) The stated reason or reasons for which the abortion was requested;

(8) The state of the pregnant woman's legal residence;

(9) the Length and weight of the aborted child, when measurable; and

(10) Whether an emergency situation caused the physician to waive any of the requirements of section 28-327 or 28-333.

The completed form shall be signed by the attending physician and sent to the Bureau of Vital Statistics within fifteen days after each reporting month. The completed form shall be an original, typed or written legibly in durable ink, and shall not be deemed complete unless the omission of any item of information required shall have been disclosed or satisfactorily accounted for. Carbon copies shall not be acceptable. The abortion reporting form required under this section shall not include the name of the person upon whom the abortion was performed. The abortion reporting form required under this section shall be confidential and shall not be revealed except upon the order of a court of competent jurisdiction in a civil or criminal proceeding.

Source: Laws 1977, LB 38, § 58; Laws 1979, LB 316, § 9.

28-344. *Reporting form; violation; penalty.* Violation of section 28-343 is a Class II misdemeanor.

Source : Laws 1977, LB 38, § 59.

28-345. *Department of Health; permanent file; rules and regulations.* The Department of Health shall prepare and keep on permanent file compilations of the information submitted on the abortion reporting forms pursuant to such rules and regulations as established by the Department of Health, which compilations shall be a matter of public record. Under no circumstances shall the compilations of information include the name of any attending physician or identify in any respect facilities where abortions are performed. The Department of Health, in order to maintain and keep such compilations current, shall file with such reports any new or amended information.

Source: Laws 1977, LB 38, § 60; Laws 1979, LB 316, § 10.

28-346. *Aborted infant; experimentation; prohibited; exception; penalty.* No person shall knowingly, intentionally, or willfully use any premature infant aborted alive for any type of scientific, research, laboratory, or other kind of experimentation except as necessary to protect or preserve the life or health of such premature infant aborted alive. Violation of this section is a Class IV felony.

Source: Laws 1979, LB 316, § 11.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV 78-L-289

WOMENS SERVICES, P.C., a Nebraska Corporation, and G. WILLIAM ORR, M. D.,

Plaintiffs,

vs.

CHARLES THONE, et al.,

Defendants.

CV 79-L-85

WOMENS SERVICES P.C., a Nebraska Professional Corporation, and G. WILLIAM ORR, M. D.,

Plaintiffs,

vs.

CHARLES THONE, et al.,

Defendants,

CV 79-L-100

MARILYN A. SCHNEIDER,

Intervenor-Defendant.

LADIES CENTER, NEBRASKA, INC., a Corporation; M. JOHN EPP, M. D.; and BETTY ROE, by her next friend, BARBARA GAITHER,

Plaintiffs,

ELIZABETH F.,

Intervenor-Plaintiff,

vs.

CHARLES THONE, et al.,

Defendants,

MARILYN A. SCHNEIDER,

Intervenor-Defendant.

AMENDED JUDGMENT

(Filed August 18, 1980)

In accordance with the memorandum and order of June 2, 1980, and the memorandum and order of August 15, 1980,

IT IS ORDERED AND ADJUDGED that the judgment of November 9, 1979, is amended to add the following:

"8. That the following amounts are allowed as fees and costs in this matter:

A. For defendants' expert witness fees, assessed against the plaintiffs, $2,577.00;

B. On behalf of the plaintiffs Betty Roe, Elizabeth F., and the class of women, attorneys' fees, expenses and costs are allowed in the amount of $11,801.24, to be paid to the American Civil Liberties Union, and attorney's fees for local counsel are allowed in the amount of $330.00;

C. On behalf of the plaintiffs Ladies Center, Nebraska, Inc. and M. John Epp, M. D., attorney's fees and costs are allowed in the amount of $26,-885.62; and

D. On behalf of the plaintiffs Womens Services, P.C., and G. William Orr, M. D., attorney's fees, expenses and costs are allowed in the amount of $36,924.52."

Dated August 15, 1980.

By the Court

/s/ Warren K. Urbom
Chief Judge

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1193

Womens Services, P.C., a Nebraska Professional Corporation; G. William Orr, M. D.; Elizabeth F.,

Appellees,

vs.

Charles Thone, Governor of the State of Nebraska; Paul L. Douglas, Attorney General for the State of Nebraska and Donald L. Knowles, County Attorney for the County of Douglas, State of Nebraska,

Appellants,

Marilyn A. Schneider

• • • •

Ladies Center, Nebraska, Inc., a corporation; M. John Epp, M. D.; Betty Roe by her next friend Barbara Gaither and Elizabeth F.,

Appellees,

vs.

Charles Thone, Governor of the State of Nebraska; Paul L. Douglas, Attorney General for the State of Nebraska and Donald L. Knowles, County Attorney for the County of Douglas, State of Nebraska,

Appellants,

Marilyn A. Schneider

• • • •

Womens Services, P.C., a Nebraska Professional Corporation and G. William Orr, M. D.,

Appellees,

vs.

Charles Thone, Governor of the State of Nebraska; Paul L. Douglas, Attorney General for the State of Nebraska and Donald L. Knowles, County Attorney for the County of Douglas, State of Nebraska,

Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Charles Thone, Governor of the State of Nebraska, Paul L. Douglas, Attorney General for the State of Nebraska and Donald L. Knowles, County Attorney for the County of Douglas, State of Nebraska, the appellants in the above styled cause, hereby appeal to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Eighth Circuit dated December 8, 1980, which judgment affirmed the final judgment of the United States District Court for the District of Nebraska dated February 4, 1980.

This appeal is taken pursuant to 28 U. S. C. § 1254, paragraph (2).

CHARLES THONE, Governor of the State of Nebraska, et al., Appellants,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States, in the United States Mail, first class postage prepaid, on the 6th day of January, 1981, to the following:

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Office-Supreme Court, U.S.
FILED
MAY 11 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1509

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES THONE, Governor of the State of Nebraska, PAUL L. DOUGLAS, Attorney General for the State of Nebraska and DONALD L. KNOWLES, County Attorney for the County of Douglas, State of Nebraska,

Appellants,

vs.

WOMEN'S SERVICES, P.C., a Nebraska Professional CORPORATION, WILLIAM G. OTT, M.D. and ELIZABETH F.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO AFFIRM

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
MOTION TO AFFIRM	1
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. THE COURT BELOW PROPERLY SUBJECTED THE STATUTORY ROADBLOCKS TO FIRST TRIMESTER ABORTION TO RIGOROUS SCRUTINY	8
A. State Regulations Which Interfere With First Trimester Abortions Must Be Subjected to Rigorous Judicial Scrutiny	8
B. This Court's Decisions on Minors' Rights to, and Medicaid Funding for, Abortions Signal No Retreat from the Strict Standard of Review Required in This Case	12
C. Neither Confusion nor Conflict Exists in the Courts Over the Proper Standard of Review . . .	23

Page

II. THE TRIAL COURT'S FINDINGS OF FACT ARE NOT CLEARLY ERRONEOUS, ARE NOT CHALLENGED AS SUCH BY APPELLANTS, AND SHOULD NOT BE REVIEWED BY THIS COURT 26

III. ABSTENTION IS MANIFESTLY IMPROPER IN THIS CASE . . . 29

A. The Abstention Doctrine Should Rarely Be Invoked 30

B. Appellants' Interpretation Is Patently Absurd and No State Court Would Adopt It 33

CONCLUSION 36

TABLE OF AUTHORITIES

Cases	Page
Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F.Supp. 1172 (N.D.Ohio 1979)	24,25
Baggett v. Bullitt, 377 U.S. 360 (1964)	31
Bellotti v. Baird, 428 U.S. 132 (1976)	31,32
Bellotti v. Baird, 443 U.S. 622 (1979)	15,17
Bigelow v. Virginia, 421 U.S. 809 (1975)	10
Brown v. Chote, 411 U.S. 452 (1973)	21
Carey v. Population Services International, 431 U.S. 678 (1977)	10,16
Charles v. Carey, 627 F.2d 772 (7th Cir. 1980)	23,28
Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976)	30
Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913 (1976)	20

Cases (continued) Page

County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959) 30

Doe v. Bolton, 410 U.S. 179 (1973) 10

Fusari v. Steinberg, 419 U.S. 379 (1975) 20

Gary-Northwest Indiana Women's Services, Inc. v. Orr, 49 U.S.L.W. 3806 (April 27, 1981) 19-21

Harris v. McRae, ___ U.S. ___, 100 S.Ct. 2671 (1980) . . . 13-15

Harris County Commissioners Court v. Moore, 420 U.S. 77 (1975) 31,35

H.L. v. Matheson, 49 U.S.L.W. 4255 (March 24, 1981) . . . 17,18

Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) . . 22

Kusper v. Pontikes, 414 U.S. 51 (1973) 31,33

Lake Carriers Association v. MacMullen, 406 U.S. 498 (1972) . 32

Maher v. Roe, 432 U.S. 464 (1977) 13-15

Cases (continued) Page

Mahoning Women's Center v. Hunter, 610 F.2d 456 (6th Cir. 1979), vacated and remanded on other grounds, ___ U.S. ___, 65 L.Ed.2d 1110 (1980) 23,25

Mandel v. Bradley, 432 U.S. 173 (1977) 20,22

Margaret S. v. Edwards, 488 F.Supp. 181 (E.D.La. 1980) . . 24

Planned Parenthood League of Massachusetts v. Bellotti, 641 F.2d 1006 (1st Cir. 1981) . 23

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 10,11,16

Planned Parenthood of Memphis v. Alexander, No. 78-2310 (W.D.Tenn., March 23, 1981) . 24,25

Procunier v. Martinez, 416 U.S. 396 (1974) 32,35

Railway Express Agency v. U.S., 7 L.Ed.2d 432 (1962) 21

Robb v. Connolly, 111 U.S. 624 (1884) 33

Roe v. Wade, 410 U.S. 113 (1973) . . . . . passim

MOTION TO AFFIRM

Appellee Elizabeth F., plaintiff below, respectfully moves pursuant to Rule 16.1 of the Rules of this Court for summary affirmance of the judgment of the Eighth Circuit Court of Appeals appealed from insofar as that judgment affects her and the class of women she represents. The Court of Appeals unanimously affirmed the judgment of the District Court that certain provisions of a Nebraska abortion control statute, which provide criminal penalties for non-compliance, unduly burdened the fundamental right to choose abortion in violation of the Fourteenth Amendment's Due Process Clause.[1/]

1/ The Court of Appeals decision is reported at 636 F.2d 206. The opinion of the District [footnote continued]

There are three, and only three, rulings before this Court which affect Elizabeth F. and the class of women she represents. First, the Court of Appeals refused to abstain from deciding the constitutionality of the definition of informed consent and reporting requirements. 2/ Second, the Court of Appeals held unconstitutionally burdensome the prohibition in Neb. Rev. Stat. §28-327 against performing an abortion without first securing the patient's

---

[footnote 1 continued]

Court is reported at 483 F.Supp. 1022. For this Court's convenience, appellee cites the opinions below to the appendix to appellants' jurisdictional statement [hereinafter "App."].

2/ The Court of Appeals also affirmed the District Court's judgment that the reporting requirement was unconstitutionally void for vagueness. App. at 67, 39-41. Appellants, however, do not contest that ruling in their jurisdictional statement.

informed consent, defined in §28-326(8) to require, in relevant part,

> ...a written statement, voluntarily entered into by the person upon whom an abortion is to be performed, whereby she specifically consents to such abortion. Such consent shall be deemed to be an informed consent only if it affirmatively appears in the written statement that the person upon whom the abortion is to be performed has been advised (a) of the reasonably possible medical and mental consequences resulting from an abortion, pregnancy, and childbirth, ...Such statement shall bear the signature of the person upon whom the abortion is to be performed and be signed by the attending physician.

Finally, the Court of Appeals struck down §28-327's mandatory forty-eight hour waiting period "between the expression of informed consent and the

actual performance of the abortion." 3/

The judgment below rests on the clearly established principles of this Court that states may not enact regulations which directly interfere with a woman's right to obtain an abortion in the first trimester of pregnancy unless the regulation is narrowly tailored to meet a compelling state interest. Appellee urges this Court to affirm

---

3/ The Court of Appeals also held unconstitutional Nebraska's requirement that a minor provide a written statement indicating that she has consulted her parent or guardian about an abortion. App. at 73. Elizabeth F. was not a minor at the time she filed her complaint, and, thus, neither she nor the class she represents were required to affirm that they had consulted a parent or guardian about the decision to obtain an abortion. Accordingly, Elizabeth F. does not address the parental consultation question. She also does not address the Court of Appeals ruling that Plaintiff-Appellee Ladies Center, Inc., had standing to sue in this action. Other rulings of the Court of Appeals in this case have not been appealed to this Court.

summarily the judgment below because, when the findings of fact of the District Court are viewed in the context of the unequivocal precedent of this Court, the grounds advanced for reversal are so manifestly insubstantial as not to require further argument.

STATEMENT OF THE CASE

The Court of Appeals affirmed the District Court's findings of fact, based upon careful consideration of extensive testimony and exhibits, that the informed consent and waiting period requirements imposed direct obstacles to a woman's decision to abort. Specifically, the Circuit Court cited the District Court's finding that "it would take several hours to 'advise'...a

pregnant woman of all the 'reasonably possible consequences' of abortion, pregnancy and childbirth." App. at 51, 72. Further, the District Court found, as the Circuit noted, that the forty-eight hour waiting period would not only increase the cost and time involved in obtaining an abortion, but also that the "increased risk" to the pregnant woman's health as a result of the delay would be "substantial." App. at 53-54, 72.

SUMMARY OF ARGUMENT

Roe v. Wade, 410 U.S. 113 (1973), and its progeny make crystal clear that the Due Process Clause forbids state regulations which directly interfere with the fundamental right to choose

abortion unless they are narrowly tailored to meet a compelling state interest.

Appellants do not, and could not, challenge the clear findings of fact that the informed consent and mandatory waiting period provisions of Nebraska's criminal abortion control statute impose a direct obstacle to women seeking abortions. Nor do appellants even suggest that these provisions are justified by a compelling state interest. Thus, they virtually concede, as they must, that the statutory provisions are an undue burden and unconstitutional.

In an effort to avoid the inevitable conclusion of unconstitutionality, appellants would divert this Court with confusing and misleading arguments that

the appropriate standard of review should be something other than what it clearly is.

This Court should not abstain from its clear duty to strike down this statute on the basis of appellants' perfectly preposterous interpretation of the provisions.

ARGUMENT

I. THE COURT BELOW PROPERLY SUBJECTED THE STATUTORY ROADBLOCKS TO FIRST TRIMESTER ABORTION TO RIGOROUS SCRUTINY

A. State Regulations Which Interfere With First Trimester Abortions Must Be Subjected to Rigorous Judicial Scrutiny

In Roe v. Wade, 410 U.S. 113 (1973), this Court established that the "right of privacy...founded in the Fourteenth Amendment's concept of personal liberty ...is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Id. at 153. Because the right to privacy guarantees independence in making certain fundamental decisions about whether or not to bear a child, state regulations interfering with the effectuation of these decisions "may be justified only by a 'compelling state interest'...and ...must be narrowly drawn to express only" that interest. Id. at 155. Laws limiting access "to the means of effectuating" decisions in matters of childbearing receive the same rigorous scrutiny as laws prohibiting the decision

altogether since "access is essential to exercise of the constitutionally protected right." Carey v. Population Services International, 431 U.S. 678, 688 (1977).

This Court has consistently applied the strict test enunciated in Roe v. Wade to state regulations which interfere with the right to choose abortion. Doe v. Bolton, 410 U.S. 179 (1973); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976). See also Bigelow v. Virginia, 421 U.S. 809 (1975).

Appellants urge that, notwithstanding this Court's unequivocal precedent, regulations inhibiting first trimester abortions should only have to be justified by a rational relationship to a legitimate state interest. Without

conceding that the regulations at issue here bear any rational relationship to any legitimate state interest, appellee submits that such an analysis is completely misguided and wholly unsupported by this Court's decisions.

Appellants mistakenly rely on Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), to the extent that it upheld a written informed consent requirement. The basis for this Court's holding was the finding of fact that the written consent requirement there did not present a direct obstacle to a woman's decision to have an abortion. Therefore, rigorous review was unnecessary. Id. at 66-67. Danforth explicitly cautioned states against informed consent provisions which "confine the

physician in an undesired and uncomfortable straitjacket in the practice of his profession." Id. at 67 n.8. Here, the Eighth Circuit affirmed the District Court's finding that Nebraska's law, "[b]y refusing to allow the physician an opportunity to tailor this information to the patient,...confines the physician in an unconstitutional straitjacket," thereby unduly burdening women's freedom to choose to terminate their pregnancies. App. at 72, 50-51.

B. This Court's Decisions on Minors' Rights to, and Medicaid Funding for, Abortions Signal No Retreat from the Strict Standard of Review Required in This Case

Appellants also distort this Court's opinions on public funding of abortions and minors' rights to abortions in their effort to create confusion where none exists and to rewrite the applicable constitutional standard.

Neither Maher v. Roe, 432 U.S. 464 (1977), nor Harris v. McRae, ____ U.S. ____, 100 S.Ct. 2671 (1980), affects the level of scrutiny or the ultimate result here. In Maher, this Court upheld a Connecticut statute which withdrew state funding from elective abortions. Finding that women had no fundamental right to state funds for elective abortions, the Court subjected the restriction to only minimal review in the equal protection context. Id. However, Maher made crystal clear that minimal review is not applicable to

this case.

> Our conclusion signals no retreat from Roe or the cases applying it. There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.

432 U.S. at 475-76.

Harris v. McRae, in which this Court upheld the federal withdrawal of Medicaid funds for most abortions, reiterated the direct interference/funding distinction. 100 S.Ct. at 2686-88. Maher and McRae are both grounded on the finding that governmental failure to

fund abortion simply is not a state-created obstacle to the fundamental right to choose abortion. In both cases, the majority specifically contrasted a funding restriction with the type of state regulation at bar. Neither Maher nor McRae lends an iota of support to appellants' argument that mere minimal scrutiny should be given the challenged statute. In fact, both cases explicitly refute it.

Similarly, this Court's decisions concerning minors' rights to abortion are no help to appellants. A minor's right to choose abortion is not co-extensive with an adult's. Bellotti v. Baird, 443 U.S. 622 (1979).[4/] Accord-

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4/ Contrary to appellants' assertion in their jurisdictional statement (at p. 11), the District Court did not view the Bellotti decision, or any decision of this Court, as a retreat from Roe v. Wade. App. at 37.

ingly, this Court's decisions on the reproductive freedom of minors reflect different considerations, which apply only to minors because of their youth. That precedent cannot, therefore, be applied to restrictions affecting all women's access to abortion.

This Court's careful scrutiny of laws restricting minors' access to abortion and contraception, notwithstanding the different status of minors, underscores the propriety of rigorous review of regulations inhibiting the right to abortion. Carey v. Population Services International, Inc., 431 U.S. 678 (1977), held that states could not prohibit the sale of contraceptives to minors. Danforth struck down a Missouri law which required parental consent before a minor could obtain an

abortion. In Bellotti v. Baird, 443 U.S. 622 (1979), this Court held unconstitutional even a statutory scheme which provided a judicial alternative to parental consent when it failed to provide a complete by-pass to parental involvement for mature minors and those immature minors whose best interests might be harmed by parental involvement.

In H.L. v. Matheson, 49 U.S.L.W. 4255 (March 24, 1981), this Court upheld a parental notification requirement only to the extent that it affected immature, dependent minors living at home, who do not claim or show that parental notification is otherwise not in their best interest. 49 U.S.L.W. at 4257 and n. 14,

4258.[5] The Chief Justice, in his opinion for the Court, observed that a notification provision "as applied to immature and dependent minors...serves the important considerations of family integrity and protecting adolescents... [and] a significant state interest by providing an opportunity for parents to supply essential medical and other information to a physician." Id. at 4259. (emphasis added) [6]

5/ In his concurring opinion, Justice Powell, joined by Justice Stewart, made clear that H.L. left open "the question whether [a notification requirement] unconstitutionally burdens the right of a mature minor or a minor whose best interest would not be served by parental notification." 49 U.S.L.W. at 4259.

6/ The Chief Justice also noted that, since the Utah statute, as applied to immature, dependent minors whose best interests are not adversely affected by parental notification, does not pose a direct obstacle to the fundamental right to choose abortion, it could, like funding restrictions, be justified by a less than compelling state interest. Id. at 4259.

Thus, it is clear that even with respect to minors, who do not enjoy the same unfettered exercise of the fundamental right to choose abortion as adults, this Court will tolerate state regulations which interfere with the effectuation of the abortion choice only when such laws are narrowly tailored to serve "important" and "significant" state interests.

Similarly, this Court's recent affirmance in Gary-Northwest Indiana Women's Services, Inc. v. Orr, 49 U.S.L.W. 3806 (April 27, 1981), does not counsel any relaxation of the rigorous review required for regulations restricting a woman's decision to abort a pregnancy in the first trimester.

In Gary-Northwest, this Court summarily affirmed the refusal of a three-

judge court to vacate an earlier judgment and issue a preliminary injunction against a regulation affecting second trimester abortions only. The summary affirmance in Gary-Northwest settles only "the issues for the parties" there, "and is not to be read as a renunciation by this Court of doctrines previously announced in [its] opinions after full argument." (footnote omitted) Fusari v. Steinberg, 419 U.S. 379, 391-393 (1975) (Burger, C.J., concurring).

Summary affirmances reject only the specific challenges presented in the jurisdictional statement. Mandel v. Bradley, 432 U.S. 173, 176 (1977). See also Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913 (1976) (Brennan, J., dissenting). The only

arguably substantive issue presented in Gary-Northwest was "whether the lower court had abused its discretion in failing to issue a preliminary injunction." No. 80-1275, Jur. St. at i (emphasis added). Reversal of the granting or denial of a preliminary injunction requires "a strong showing" that the lower court ruling "was plainly the result of an improvident exercise of judicial discretion." Railway Express Agency v. U.S., 7 L.Ed.2d 432, 434 (1962), quoting United Fuel and Gas Co. v. Public Service Commission, 278 U.S. 322, 326 (1929). "In reviewing...interlocutory relief, this Court...intimate[s] no view as to the ultimate merits..." Brown v. Chote, 411 U.S. 452, 457 (1973). Thus, the summary affirmance in Gary-Northwest has no

precedential value with respect to the standard of review to be applied to abortion restrictions in the first trimester which have been fully heard on the merits. Indeed, this Court has made clear that "a summary affirmance is an affirmance of the judgment only, ...[and]...should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." Mandel v. Bradley, 432 U.S. at 176. See also Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 180-181 (1979). Application of established principles to the facts in this case warrants a summary affirmance of the judgment below.

C. Neither Confusion nor Conflict Exists in the Courts Over the Proper Standard of Review

Appellants liberally lace their jurisdictional statement with intimations of confusion in the lower courts over the proper standard of review for state regulations which directly interfere with the right to choose abortion. No confusion exists. The Courts of Appeals and the District Courts unanimously agree with, and uniformly apply, the standard of review set forth by this Court in Roe v. Wade. Planned Parenthood League of Massachusetts v. Bellotti, 641 F.2d 1006, 1014-1015 (1st. Cir. 1981); Charles v. Carey, 627 F.2d 772 (7th Cir. 1980); Mahoning Women's Center v. Hunter, 610 F.2d 456,

460 (6th. Cir. 1979), vacated and remanded on other grounds, ___ U.S. ___, 65 L.Ed.2d 1110 (1980); Planned Parenthood of Memphis v. Alexander, No. 78-2310 (W.D.Tenn., March 23, 1981), slip opinion at 15-17; Margaret S. v. Edwards, 488 F.Supp. 181, 189-190 (E.D.La. 1980); Scheinberg v. Smith, 482 F.Supp. 529, 536-537 (S.D.Fla. 1979); Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F.Supp. 1172, 1197 n.21 (N.D.Ohio 1979);[7/] Women's Commu-

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7/ Appellants cite Akron, Alexander, and Wolfe v. Schroering, 541 F.2d 523 (6th Cir. 1976), to illustrate their "considerable confusion and conflict" contention. Jur. St. at 10, 13. These cases demonstrate no such thing. First, appellants rely on an earlier decision in the Tennessee case addressing a preliminary injunction, which necessarily involves a lesser standard. Planned Parenthood of Memphis v. Blanton, No. 78-2310 (W.D.Tenn., August 31, 1979). However, since appellants filed their jurisdictional statement, that court, after trial on

[footnote continued]

nity Health Center, Inc. v. Cohen, 477 F.Supp. 542, 545 (D.Me. 1979).

[footnote 7 continued]

the merits, has permanently enjoined the waiting period, applying the proper standard. Planned Parenthood of Memphis v. Alexander, No. 78-2310 (W.D.Tenn., March 23, 1981), slip opinion at 15-17. [Copies of the slip opinions are lodged with this Court.]

Wolfe v. Schroering upheld a waiting period, noting specifically that no claim had been made that the delay burdened the abortion decision. 541 F.2d at 526. In Akron Center for Reproductive Health, Inc. v. City of Akron, the court found, as a matter of fact, that the degree of interference imposed by the twenty-four hour waiting period was simply to "make effectuation of the abortion decision more expensive..." 479 F.Supp. at 1204. The court concluded that "[t]his increase in expense...is not such that the waiting period must withstand a compelling interest test." Id. In sharp contrast, the finding of fact in this case is that the waiting period, as well as informed consent provisions, constitute a direct obstacle, requiring rigorous scrutiny. Moreover, Mahoning Women's Center v. Hunter, decided by the Sixth Circuit after the Akron decision, casts serious doubt on the holding in Akron, which is now on appeal to that circuit.

II. THE TRIAL COURT'S FINDINGS OF FACT ARE NOT CLEARLY ERRONEOUS, ARE NOT CHALLENGED AS SUCH BY APPELLANTS, AND SHOULD NOT BE REVIEWED BY THIS COURT

Appellants do not, and could not, seriously contest the solidity of the District Court's findings of fact, affirmed by the Court of Appeals. Review by this Court of factual findings is appropriate only when such findings are "clearly erroneous." United States v. General Dynamics Corp., 415 U.S. 486, 508 (1974). This Court has stated that "[i]t is not our place...to reappraise the evidence, unless it plainly fails to support the findings of the trier of

facts." Roemer v. Maryland Public Works Board, 426 U.S. 736, 758 (1976). Appellants have neither alleged nor shown that the trial court's findings of fact are "clearly" and "plainly" unsupported by the evidence.

Instead, appellants confuse conclusions of law with findings of fact and simply fail to follow the steps of substantive due process analysis. They question the lower court's "factual finding" that the challenged statutes "unduly burden the right to seek an abortion." Jur. St. at 14 (emphasis added). However, as the Seventh Circuit has articulated, "the term 'undue burden' defines the ultimate constitutional issue, not merely the threshold requirement for strict scrutiny. When describing specifically the burden of

the party challenging a state regula-tion, the Supreme Court has not used the term 'undue.'" Charles v. Carey, 627 F.2d 772, 777 (7th Cir. 1980). The proper due process analysis, which was applied by the court below, is:

> The threshold question whether there is a "burden" or "direct interference" in the pregnancy determination decision requires the plaintiff merely to show the requisite degree of interference. If the interference is sufficiently substantial and not de minimis, the State has to show the compelling basis for the law, that is, that the burden is not "undue" or unjustifiable.

Charles v. Carey, 627 F.2d at 777.

Appellants virtually concede the unconstitutionality of the Nebraska provisions under the heightened standard of review applied by the Court

below and mandated by Roe v. Wade. See Point I, supra. The question they present, framed as an attack on the factual findings, is merely a reiteration of their spurious argument for a lower standard of review in disguise.

III. ABSTENTION IS MANIFESTLY IMPROPER IN THIS CASE

Appellants urge, absurdly, that the court below should have abstained from deciding the constitutionality of the informed consent definition. They offer an implausible construction of the statute which, they say, would render a doctor virtually immune from prosecution if a signed document simply existed. The Court of Appeals rejected appellants' argument. App. at 73. The

District Court had earlier concluded that, "[b]ecause the construction offered by the defendants would strain a plain reading of the provisions in question,...the provisions are not susceptible of this construction in order to warrant deference to the state courts under the abstention doctrine." App. at 44-46 and n.20.

A. The Abstention Doctrine Should Rarely Be Invoked

The abstention doctrine is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976), quoting County of Alle-

gheny v. Frank Mashuda Co., 360 U.S. 185, 188-189 (1959). This Court has "repeatedly warned...that because of the delays inherent in the abstention process and the danger that valuable federal rights might be lost in the absence of expeditious adjudication in the federal court," abstention may be invoked only in narrowly limited circumstances. Harris County Commissioners Court v. Moore, 420 U.S. 77, 83 (1975); Kusper v. Pontikes, 414 U.S. 51, 55 (1973); Baggett v. Bullitt, 377 U.S. 360, 375 (1964).[8/]

8/ The hardships of delay are an important consideration in deciding whether or not abstention is justified. One factor to which the courts have attached significance is the presence of a rule allowing certification of questions directly to the highest state court for prompt resolution. Bellotti v. Baird, 428 U.S. at 150. No such procedure exists in Nebraska.

Abstention is appropriate only where there is an uncertain issue of state law susceptible of a construction by a state court which may avoid or materially alter the constitutional issue involved. Bellotti v. Baird, 428 U.S. 132, 146-147 (1976). See also Procunier v. Martinez, 416 U.S. 396, 402-403 (1974); Lake Carriers Association v. MacMullen, 406 U.S. 498, 511 (1972). This Court has held that in cases

> [w]here...it cannot be fairly concluded that the underlying state statute is susceptible of an interpretation that might avoid the necessity for constitutional adjudication, abstention would amount to shirking the solemn responsibility of the federal courts to "guard, enforce, and protect every right granted or secured by the Constitution of the United

States." Robb v. Connolly, 111 U.S. 624, 637.

Kusper v. Pontikes, 414 U.S. at 55.

B. Appellants' Interpretation Is Patently Absurd and No State Court Would Adopt It

Appellants suggest that the informed consent provision requires only a voluntarily signed document. This, they argue, will set up an irrebuttable presumption that the woman was properly informed, and, therefore, no doctor possessing such a piece of paper could be subjected to prosecution under the challenged statute. This farfetched interpretation would not only frustrate the legislative intent, but would render the statute meaningless. The law requires that the doctor, as well as

the woman, sign the consent form. The only purpose such a requirement serves is to insure that the information was in fact given. Moreover, the asserted legislative purpose of protecting maternal health would only be served if the woman were actually informed.

Appellants themselves cannot rationally or coherently explain reading the statute to remove the requirement that the woman actually receive the requisite information. There would be no point to the statute construed as appellants urge. Indeed, one would "have to wonder why it's even the law." (Trial Transcript, Dr. Orr, p. 374.)

Abstention is equally absurd with respect to §28-343, which requires doctors to report every abortion "pre-

scribed" as well as those performed. Appellants thoroughly mischaracterize the holding below, which did not purport to construe the statute. Jur. St. at 20; App. at 39-41. The District Court struck down this provision on void-for-vagueness grounds, because doctors "would not know how to comply" with the statutory requirement. App. at 41. Indeed, the impropriety of abstention is heightened by the vagueness holding here. This Court has held that abstention is particularly inappropriate "where the vagueness...goes to the obligations imposed by the statute..." Harris County Commissioners Court v. Moore, 420 U.S. at 86 n.9; see also Procunier v. Martinez, 416 U.S. at 401-402 and n.5. No reasonable state court construction could render §28-

343 constitutional.

There is no basis whatever for abstention in this case.

CONCLUSION

In Roe v. Wade, this Court established a rigorous standard of review for state regulations directly interfering with women's access to first trimester abortions. That strict standard must be applied to the Nebraska statutory provisions, which directly interfere with the ability of women to choose and obtain abortions.

This Court should summarily affirm the judgment below, making clear once again that it will tolerate no state-created obstacles to the fundamental right to choose abortion.

Respectfully submitted,

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No. 80-1509

In The

Supreme Court of the United States

October Term, 1980

WOMENS SERVICES, P.C., et al.,
Appellees,

vs.

CHARLES THONE, Governor of the State of Nebraska, et al.,
Appellants.

LADIES CENTER, NEBRASKA, INC., et al.,
Appellees,

vs.

CHARLES THONE, Governor of the State of Nebraska, et al.,
Appellants.

WOMENS SERVICES, P.C., et al.,
Appellees,

vs.

CHARLES THONE, Governor of the State of Nebraska, et al.,
Appellants.

On Appeal from the United States Court of Appeals for the Eighth Circuit

---

MOTION OF LADIES CENTER, NEBRASKA, INC. AND M. JOHN EPP, M.D. TO AFFIRM

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TABLE OF CONTENTS

Pages

Motion to Affirm 1

Argument in Support of Summary Affirmance 2

Conclusion 14

Appendix A

Complaint, *Ladies Center, Nebraska, Inc., et al. v. Charles Thone, Governor of the State of Nebraska, et al.*, United States District Court for the District of Nebraska, CV 79-L-100 ..... App. 1

Appendix B

Portion of Memorandum and Order re: Preliminary Injunction in *Ladies Center, Nebraska, Inc., et al. v. Charles Thone, Governor of the State of Nebraska, et al., supra* ..... App. 15

Appendix C

Portion of Order on Pre-trial Conference in *Ladies Center, Nebraska, Inc., et al. v. Charles Thone, Governor of the State of Nebraska, et al., supra* ..... App. 18

Appendix D

Portions of testimony and portions of Exhibit "2" received in evidence by the District Court during the trial of *Ladies Center, Nebraska, Inc., et al. v. Charles Thone, Governor of the State of Nebraska, et al., supra* ..... App. 20

TA LE OF AUTHORITIES

CASES CITED

Pages

Baird v. Bellotti, 393 F. Supp. 897 (U. S. D. C. Mass 1975), vacated and remanded on other grounds, *sub nom.* 8

Bellotti v. Baird, 428 U. S. 132 (1976) 8

Bee Publishing Co. v. State, 107 Neb. 74 (1921) 8

Carey v. Population Services, International, 431 U. S. 678 (1977) 12

Doe v. Bolton, 410 U. S. 179 (1973) 5

Fox Valley Reproductive Health Care Center, Inc. v. Arft., 446 F. Supp. 1072 (U. S. D. C. E. D. Wisc. 1978) 12

Friendship Medical Center, Ltd. v. Chicago Board of Health, 505 F. 2d 1141 (6th Cir. 1974) 12

Mobile Women's Med. Clinic v. Bd. of Com'rs., 426 F. Supp. 33 (U. S. D. C. S. D. Ala. 1977) 10

People v. Travers, 124 Cal. Rptr. 728 (1975) 8

Planned Parenthood v. Citizens for Com. Action, 558 F. 2d 861 (8th Cir. 1977) 12

State v. Foster, 196 Neb. 332 (1976) 7

State v. Norman, 193 Neb. 719 (1975) 7

STATUTES CITED

Mass. Gen. Laws, Ann., ch. 112 §§ 12L, 12Q, 12S, 12T, 12U 9

STATUTES CITED—Continued

	Pages
Neb. Rev. Stat. § 28-109 (16)	7
Neb. Rev. Stat. §§ 28-333, 28-334, 28-326 (8), 28-327, 28-328, 28-343, 28-344	3
Neb. Rev. Stat. § 28-206 (Supp. 1978)	7
Neb. Rev. Stat. § 28-337 (Supp. 1978)	10
Neb. Rev. Stat. § 28-327	10
Neb. Rev. Stat. § 28-343	10
Neb. Rev. Stat. § 28-344	10
42 U. S. C. § 1988	13

RULE CITED

F. R. C. P. Rule 801 (d) (2)	6

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On Appeal from the United States Court of Appeals for the Eighth Circuit

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MOTION OF LADIES CENTER, NEBRASKA, INC. AND M. JOHN EPP, M.D. TO AFFIRM

MOTION TO AFFIRM

Appellees M. John Epp, M. D., and Ladies Center, Nebraska, Inc. (herein L. C. N.), pursuant to Rule 16, Rules of the Supreme Court of the United States, move that the final judgment of the United States District Court for the District of Nebraska dated February 4, 1980 and affirmed

by the United States Court of Appeals for the Eighth Circuit on December 8, 1980 be affirmed for the reason that the questions are so unsubstantial as not to warrant further argument.

ARGUMENT IN SUPPORT OF SUMMARY AFFIRMANCE

I.

Preliminary Statement

These appellees adopt by reference the argument of appellees Women's Services, P. C., G. William Orr, M. D. and Elizabeth F. presented in support of their motions to affirm. Additionally, appellee L. C. N. will present argument in support of summary affirmance of the determination by the courts below that it had standing to challenge the constitutionality of the statutes involved in this appeal.

II.

The Question of Whether Ladies Center, Nebraska, Inc. Has Standing Does Not Warrant Further Argument

---

A.

STATEMENT OF FACTS

The following facts are relevant to a determination by this Court of whether this appellee has standing to assert

the unconstitutionality of NEB. REV. STAT., sections 28-333, 28-334, 28-326 (8), 28-327, 28-328, 28-343 and 28-344 (herein called the "challenged sections").

In its complaint, L. C. N. alleges that it is a corporation furnishing facilities and support staff to physicians for the performance of family planning, pregnancy tests, birth control, termination of pregnancy through abortion and related gynecological services (App. A, p. 3). The district court certified as a class of plaintiffs those organizations which offer and provide facilities and support staff to physicians who perform abortions and designated L. C. N. as class representative (App. B, pp. 16-17).

The physical facilities furnished by Ladies Center include the building in which physicians perform the medical procedures and all necessary medical and non-medical equipment.

A description of the personnel provided by L. C. N., the required qualifications and the duties of each staff member, is contained in L. C. N.'s Procedure Manual received in evidence as Exhibit 2 (App. D, pp. 30, et seq.).

Although all medical functions of the clinic are under the supervision and control of the medical director, the members of the staff are employees of L. C. N. Neither the medical director, nor any physician, is an employee of L. C. N. (App. D, pp. 21, 29-30).

L. C. N.'s current medical director, Dr. M. John Epp, testified that he has no connection with scheduling of patients for abortion procedures. All scheduling is done by employees of L. C. N. The procedure manual reveals that patient scheduling is a job duty of the telephone appointment assistant (App. D, pp. 22, 29-30, 34).

Informed consent for the abortion is routinely obtained by employees of L. C. N. The clinic director is the party who imparts the informed consent information to the patients (App. D, p. 26).

The counselors employed by L. C. N. explains the abortion procedures and complications which may result and the alternatives to abortion (App. D, pp. 27, 45-52).

The following are among the services furnished and the personnel provided by L. C. N. to physicians performing abortions within the facility:

(1) Clerical and secretarial personnel who schedule and admit patients, assist in the completion of all necessary pre-procedure forms, and prepare the abortion report forms required by the State (App. D, pp. 23, 33, 34).

(2) Maintain complete medical records for all patients (App. D, pp. 32, 33).

(3) Nursing staff to assist physicians during abortion procedures and pre- and post-operative patient care (App. D, pp. 35-37, 55, 56).

(4) Patient screening to determine eligibility for abortion procedures and referral of any problem patient to the physician for pre-operative counseling or examination (App. D, pp. 40, 53).

(5) Necessary pre-operative laboratory work and lab technician to complete laboratory tests (App. D, p. 32).

The amount of fees charged, and the manner of payment, is determined by L. C. N. The clinic has a policy that it will provide free abortion services to certain select patients.

Dr. Epp is an independent contractor, performing abortions on a fee for service basis, and has no ownership interest.

Not only does the clinic fee, when one is charged, include the abortion itself, but it also includes all laboratory tests and post-operative care (App. D, pp. 34, 41, 57).

B.

ARGUMENT

With respect to standing to challenge statutes regulating the performance of abortions, this Court has held that the existence of a real potential for personal detriment to a plaintiff is all that is necessary to confer standing upon the party threatened with the detriment and that justiciability exists notwithstanding that no actual detriment was suffered prior to the institution of the action. The threat of criminal prosecution is sufficient to create the requisite potential for personal detriment. *Doe v. Bolton*, 410 U. S. 179 (1973).

The question which must be answered is whether the challenged statutes operate as directly against the class of appellees represented by L. C. N. as they do against the

physician-appellees, for, if they do, then L. C. N. is in no different position than the physicians and has the requisite standing to attack the validity of the legislative enactment.

Appellants challenge the district court's finding "That Ladies Center satisfies the Article III dimension of standing is beyond serious dispute" (Appellants' App. A, p. 4), and argue that "It is undisputed that the appellee Ladies Center, Nebraska, Inc., cannot be prosecuted directly for violations of the challenged statutes since those statutes are directed at licensed physicians and not persons who provide administrative assistance to the physicians who performs abortions." (Appellants' Jurisdictional Statement, p. 17). This argument completely mis states the facts and the law.

In their brief opposing the granting of a preliminary injunction, appellants made the following statements: "defendants admit without qualification that the statutes in question were enacted and will be enforced in the interests of unborn children from the moment of conception; defendants again admit without qualification that the questioned statutes do impose criminal penalties in a select area of medicine but for good cause." These statements were received in evidence during trial, without objection, as F. R. C. P. Rule 801 (d) (2) admissions by defendants.

The district court's Order on Pre-trial Conference contained the following statement of fact that was uncontroverted by appellants:

> "The plaintiff Ladies Center, Nebraska, Inc. is a Florida Corporation authorized to do business in the State of Nebraska which offers facilities and support

> staff to physicians for the performance of family planning, pregnancy tests, birth control, termination of pregnancy through abortion and related gynecological services. The challenged sections subject physicians who perform abortions and facilities which provide supportive services to such physicians to regulation and criminal prosecution should they fail to comply with any of the challenged sections." (App. C, p. 19).

The Nebraska Criminal Code is designed to reach not only individuals, but also corporations. R. S. Supp., Section 28-109 (16).

R. S. Supp., 1978, Section 28-206 provides: "A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender."

State v. Norman, 193 Neb. 719 (1975) holds that a party may be convicted as an aider and abettor even though he is personally incapable of committing the criminal offense.

In order to be convicted as an aider and abettor it is not necessary that the principal offender be charged, but only that the party prosecuted under section 28-206 has, in some way, associated himself with, or participated in, the criminal venture.

State v. Foster, 196 Neb. 332, 336 (1976) holds:

> ". . . The law is well established under the section that conviction of the principal is not necessary for conviction of an aider and abettor and that, in fact, it is not even necessary that the identity of the principal be established."

An employer or principal may be held criminally liable for the acts of his employee or agent particularly where the conduct of the agent violates a statute which, such as

the challenged sections, requires no specific criminal intent, or criminal negligence.

Bee Publishing Co. v. State, 107 Neb. 74 (1921) involved a prosecution for criminal contempt by the publication of a newspaper article. Defendants were the reporter who wrote the article, the editor of the newspaper and its corporate owner. The conviction of the owner was affirmed.

> "In the exercise of the police power it has frequently been held permissible to inflict punishment upon a person for the commission of an unlawful act by his agent, even though the principal was unaware that the act was being committed, and in some instances punishment has been imposed when the agent had been expressly directed to refrain from the commission of the proscribed act. An illustration, now less familiar than formerly, is seen in the cases wherein licensed vendors of intoxicating liquors were convicted for the unlawful sale of intoxicated persons, notwithstanding the fact that the unlawful act was committed by the owner's barkeeper and without the knowledge of his employer and in disregard of his express instructions." 107 Neb. at 80.

See also *People v. Travers,* 124 Cal. Rptr. 728 (1975).

Squarely on point on the issue of standing is *Baird v. Bellotti,* 393 F. Supp. 847 (U. S. D. C. Mass. 1975), vacated and remanded on other grounds *sub nom., Bellotti v. Baird,* 428 U. S. 132 (1976).

In that case, one of the plaintiffs provided precisely the same services as does L. C. N. Parents Aid Society, Inc., was a non-profit corporation providing abortions through its medical director and supporting personnel. The physician-medical director worked at the facility two days per week and performed abortions on a fee basis.

The statute under attack provided in relevant part (all reference to Mass. Gen. Laws, Ann., ch. 112):

> Section 12L. ". . . [N]o abortion may be performed except by a physician. . . ."
>
> Section 12Q. ". . . [N]o abortion may be performed . . . unless the written informed consent of the proper person or persons has been delivered to the physician performing the abortion as set forth in section twelve S; . . ."
>
> Section 12S. "If the mother is less than eighteen years of age and has not been married, the consent of both the mother and her parents is required. . . . Such form shall be signed by the proper person or persons and given to the physician performing the abortion. . . ."
>
> Section 12T. ". . . Any person who willfully violates the provisions of section twelve Q . . . shall be punished by a fine of not less than one hundred dollars nor more than two thousand dollars."
>
> Section 12U. ". . . [A]ny person whose consent is required . . . pursuant to section twelve S . . . may petition . . . for an order enjoining the performance of any abortion that may be performed contrary to the provisions of section twelve L to twelve T, inclusive."

The conduct which mandated the imposition of criminal sanctions was the performance of an abortion by a physician without first having the executed consent delivered to him. Nevertheless, the clinic was held to have standing.

> ". . . The Society's standing is conferred not only by its direct subjection to criminal liability but also by the recognition that even general enforcement of the statute against physicians alone would seriously interfere with its ongoing activities. *Doe v. Bolton*, 1973, 410 U. S. 179, 188, 93 S. Ct. 739, 35 L. Ed. 2d 201; *Truax v. Raich*, 1915, 239 U. S. 33, 38-39, 36 S. Ct. 7, 60 L. Ed. 131." 393 F. Supp. at 851.

The provision of R. S. Supp. 1978, section 28-337 that "no . . . facility shall be required to admit any patient for the purpose of performing an abortion nor required to allow the performance of an abortion therein. . . ." acknowledges that L. C. N. has the authority to control whether abortions will, or will not, be performed within its facility.

The State, in reliance upon this statute, could clearly prosecute this plaintiff as an aider and abettor if it permitted any abortion to proceed with the knowledge that there had been non-compliance by the physician with any requirement of the challenged sections.

The physician may delegate to another the giving of the informed consent advice (note original Neb. Rev. Stat., § 28-327 requiring *physician* to inform). The party to whom this duty is delegated is in a far better position than the physician to know whether the advice required by the statute had in fact been given, whether 48 hours had, in fact passed between expression of informed consent and performance of the abortion, whether the statement of consent had, in fact, been "voluntarily" entered into by the woman, and whether the woman was a minor under the age of 18.

Section 28-343 does not specify who has the duty to "send" the completed report form to the Department of Health. Section 28-344 imposes criminal liability upon *any* person disclosing information without authorization.

The challenged sections operate to the detriment of this plaintiff in ways other than subjecting it to criminal prosecution.

In *Mobile Women's Med. Clinic v. Bd. of Com'rs.*, 426 F. Supp. 33 (U. S. D. C. S. D. Ala. 1977), plaintiff clinic provided first trimester abortions. The medical director

was responsible for the policies and procedures of the clinic and performed the abortion procedures. The ordinance not only regulated clinic operation, but also regulated physicians who performed abortions. The Court held the clinic to have standing to challenge the entire ordinance.

> ". . . Standing is conferred upon Mobile Women's Medical Clinic and upon Dr. Robinson because of the financial interest of those parties. *Singleton v. Wulff*, 428 U. S. 106, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976)."

Appellants argue that dismissal of L. C. N. should be ordered because the presence of the physicians is all that is required to enable the Court to resolve all issues raised herein. This argument is without merit.

The standing of a particular plaintiff is not dependent upon whether any other plaintiff does nor does not have standing. The standing of each party must rest upon the potential for detriment to that party.

In this case the issue is not only whether the challenged sections subject this plaintiff to the threat of criminal prosecution and will interfere with its continued operation, which they will, but also whether the challenged sections impinge upon the right of the woman, at least during the first trimester of pregnancy, to be free from unwarranted governmental regulation which affects the abortion decision.

The Court, in considering the evidence before it, must draw the inference that L. C. N. would, in all probability, find it difficult, if not impossible, to continue to furnish facilities and support staff to physicians if it is threatened with criminal prosecution and must contend with state interference with its method of operation. Further, a physi-

cian would find it impossible to provide abortion services without the facilities and other services provided by this plaintiff. These factors would unquestionably burden the abortion decision of the woman.

Carey v. Population Services, International, 431 U. S. 678, 688 (1977) holds:

> ". . . [D]ecisions after *Roe v. Wade* . . . held unconstitutional statutes that did not prohibit abortions outright but limited a variety of ways a woman's access to them. . . . The significance of these cases is that they establish that the same test must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely. . . ."

Standing is also conferred by reason of the fact that Ladies Center asserts not only its own right, but also those of its patients (App. A, pp. 8, 10-12).

Planned Parenthood v. Citizens for Com. Action, 558 F. 2d 861 (8th Cir. 1977) permitted a clinic to assert the constitutional claims of its patients, recognizing that:

> ". . . There is an intimate relationship between Planned Parenthood and its patients and the right of a pregnant woman is 'inextricably bound up' with the ability of Planned Parenthood to provide one. . . ." 558 F. 2d at 865, fn. 3.

In accord are *Friendship Medical Center, Ltd. v. Chicago Board of Health*, 505 F. 2d 1141 (6th Cir. 1974) and *Fox Valley Reproductive Health Care Center, Inc. v. Arft.*, 446 F. Supp. 1072, 1074 (U. S. D. C. E. D. Wis.).

Appellants complain that the presence of L. C. N. unnecessarily added to the cost of this case in that it was

awarded attorney's fees and costs pursuant to 42 U. S. C. § 1988. This is a frivolous basis upon which to ask this Court to abandon well established rules of standing and justiciability.

An examination of the attorney's fee award (Appellants' App. F, p. 86) shows that judgment was rendered jointly in favor of this appellee and appellee M. John Epp, M. D. Appellants have not challenged the standing of the physician and dismissal of L. C. N. could not conceivably affect the award of fees as to him.

The district court, by order entered April 20, 1979, some 4 months prior to commencement of trial, consolidated the case in which L. C. N. was a plaintiff with a related case previously filed by appellees Womens Services, P. C., et al. (App. B, p. 16).

L. C. N.'s complaint put appellants on notice that it would seek a section 1988 fee award in the event it prevailed in its attack on the challenged sections (App. A, p. 14).

Had appellants really believed that the presence of L. C. N. was unnecessary to a determination of the issues in the case and had they been truly concerned that its presence would add unnecessary costs, they had ample opportunity to object to appellant's participation in the consolidated action, either by objecting to consolidation or by moving to sever L. C. N.'s case from the cases of Womens Services and to request the district court hold its suit in abeyance until the latter's case had been decided. Not only did they not do this, they in fact consented to the consolidation (App. B, p. 16).

Appellants also did not avail themselves of the opportunity to make their present argument before the district

court by way of objection to the award of any fee to L. C. N. or as a reason for reducing the amount of any fee awarded.

Having failed to take any action to protect themselves from what they now characterize as an "exposure" to "excessive attorney fee awards", appellants have forfeited any right to now argue L. C. N.'s lack of standing on this basis.

Appellants' contention that L. C. N. was an "unneeded" party ignores the fact that it was designated as a class representative of a class which could not have been represented by any of the other appellees and therefore acted to protect an interest entirely separate and distinct from the interests of the other appellees.

CONCLUSION

For the reasons above stated, L. C. N. requests that the Supreme Court summarily affirm the decisions of the district and circuit courts finding that Ladies Center, Nebraska, Inc. had standing to challenge the constitutionality of the statutes in question.

Respectfully submitted,

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APPENDIX TO MOTION TO AFFIRM

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Civil Action No. 79-L-100

LADIES CENTER, NEBRASKA, INC., A Corporation: M. JOHN EPP, M.D.; and, BETTY ROE, By Her Next Friend, BARBARA GAITHER,

Plaintiffs,

vs.

CHARLES THONE, GOVERNOR OF THE STATE OF NEBRASKA; PAUL L. DOUGLAS, ATTORNEY GENERAL FOR THE STATE OF NEBRASKA; and, DONALD L. KNOWLES, COUNTY ATTORNEY FOR THE COUNTY OF DOUGLAS, STATE OF NEBRASKA,

Defendants.

VERIFIED COMPLAINT

COME NOW the plaintiffs Ladies Center, Nebraska, Inc., a Florida corporation qualified to do business in the State of Nebraska; M. John Epp, M.D.; and, Betty Roe, by her next friend, Barbara Gaither, individually and on behalf of all others similarly situated, and for their complaint against defendants Charles Thone, Governor of the State of Nebraska; Paul L. Douglas, Attorney General for the State of Nebraska; and Donald L. Knowles, County Attorney for Douglas County, Nebraska, and all others similarly situated, their agents and successors, state as follows:

PRELIMINARY STATEMENT

1. This is a civil rights action brought under 42 U. S. C. Section 1983 and the United States Constitution by a physician, a Florida corporation authorized to do business in Nebraska which offers facilities and support staff to such physician for the performance of family planning, pregnancy tests, birth control, termination of pregnancy through abortion and related gynecological services, and a pregnant woman desiring an abortion, asserting the rights of themselves and of the patients of said physician, against certain officials of the State of Nebraska responsible for the enforcement and administration of the Nebraska Criminal Code, Sections 28-325 to 28-334, inclusive, 28-336 and 28-342 through 345 inclusive enacted by the 1977 Nebraska Legislature as Legislative Bill 38, and subsequently amended by the 1979 Nebraska Legislature as Legislative Bill 316. A copy of said sections and amendments is attached as Exhibit A and will sometimes herein be referred to as the challenged sections. Plaintiffs seek declaratory and injunctive relief.

2. The challenged sections became effective on March 22, 1979, and will be operative at 12:01 A.M., April 21, 1979. On their face, and as applied to the plaintiffs and all others similarly situated, the challenged sections restrict the performance of abortions and subject physicians who perform abortions and facilities which provide supportive services to such physicians, to regulation and criminal prosecution should they fail to comply with any of the challenged sections in violation of the rights of the plain-

tiffs as secured by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

3. Plaintiffs seek declaratory and injunctive relief. The basis of the action is that the challenged sections violate rights guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

JURISDICTION

4. This Court has jurisdiction of this action by virtue of 28 U. S. C. Section 1343 (3) and 1343 (4), authorizing jurisdiction of claims brought under 42 U. S. C. Section 1983 to enforce rights guaranteed by the United States Constitution. This Court also has jurisdiction of this action pursuant to 28 U. S. C. Section 1331 as the claims arise under the United States Constitution, and the matter and controversy exceeds $10,000, exclusive of costs and interest. This action also seeks declaratory judgment pursuant to 28 U. S. C. Section 2201 to Section 2202.

PARTIES

5. Plaintiff, Ladies Center, Nebraska, Inc., is a corporation organized under the laws of the State of Florida and authorized to do business in the State of Nebraska. Ladies Center, Nebraska, Inc. offers facilities and support staff to plaintiff M. John Epp, M.D. for the furnishing of services by said physician to women in the area of family planning, pregnancy tests, birth control, termination of pregnancy through abortion and related gynecological services.

6. Plaintiff M. John Epp, M. D., is a citizen of the United States residing in Lincoln, Lancaster County, Nebraska, and is a physician licensed to practice medicine in the State of Nebraska. Plaintiff Epp is actively engaged in the practice of emergency medicine in Lincoln, Lancaster County, Nebraska, and is actively engaged in the practice of obstetrics and gynecology in Omaha, Douglas County, Nebraska. He is a member of the attending staff at Bryan Memorial Hospital and serves on the courtesy staff of St. Elizabeth's Hospital and Lincoln General Hospital. He is a member of the American Medical Association, the Nebraska State Medical Society, Lancaster County Medical Society, American College of Emergency Physicians and the Nebraska Chapter of the American College of Emergency Physicians.

7. Plaintiff Betty Roe is a citizen of the United States residing in Lincoln, Lancaster County, Nebraska. She is eighteen years of age and unemployed. She is a single parent of one infant child who does not reside with her. Betty Roe is nine to ten weeks pregnant and desires an abortion. Betty Roe brings this action through her next friend on her own behalf and on behalf of all those similarly situated.

8. Barbara Gaither is a citizen of the United States residing in Lincoln, Lancaster County, Nebraska, and brings this action as the next friend of Betty Roe pursuant to Rule 17(c) of the Federal Rules of Civil Procedure and R. R. S. 1943, Section 25-307.

9. Defendant, Charles Thone, is the Governor of the State of Nebraska. He is the Chief Executive Officer of the State of Nebraska. As such, he is responsible for the

execution of the laws of the State, including the challenged sections. Unless restrained by order of this Court, defendant Thone will perform his duties to insure that the challenged sections are executed.

10. Defendant, Paul L. Douglas, is the Attorney General of the State of Nebraska. As such, he is responsible for the enforcement of the challenged sections. Unless restrained by order of this Court, the defendant Douglas will perform his duties to insure that the challenged sections are enforced.

11. Defendant, Donald L. Knowles, is the County Attorney of Douglas County, Nebraska. As such, he is responsible for the enforcement of the challenged sections throughout Douglas County, Nebraska. Unless restrained by order of this Court, defendant Knowles will perform his duties to insure that the challenged sections are enforced.

CLASS ACTION ALLEGATIONS

12. In the course of his ordinary and usual medical practice, plaintiff Epp receives requests from pregnant patients, including minor patients under the age of eighteen years, desiring pregnancy terminations to be performed by qualified physicians under proper medical conditions. Plaintiff Epp presently offers, provides, renders and performs pregnancy termination procedures for women, including minors under the age of eighteen years, as part of his medical practice and intends to continue to provide such medical services. Plaintiff Epp brings this action pursuant to Rule 23(a), (b)(1)(A) and (b)(2) of the Federal Rules of Civil Procedure on behalf of all duly

licensed physicians and surgeons presently performing or desiring to perform pregnancy termination procedures for patients in the State of Nebraska and on behalf of all patients desiring pregnancy terminations within the State of Nebraska. The class is so numerous that the joinder of all such persons is impracticable. There are questions of law and fact common to the class. The claims of the representative party are typical of the class. The representative party will fairly and adequately protect the interests of the class, and the parties opposing the class are acting on grounds generally applicable to the class, thereby making appropriate declaratory and injunctive relief with respect to the class as a whole. Prosecution of separate actions by or against individual members of the class could create a risk of inconsistent or varying adjudication with respect to individual members of the class which would establish incompatible standards of conduct under the Nebraska Criminal Code challenged sections.

13. Plaintiff Ladies Center, Nebraska, Inc. is a corporation organized under the laws of the State of Florida and authorized to do business in the State of Nebraska. Ladies Center, Nebraska, Inc. offers facilities and support staff to plaintiff M. John Epp., M. D. for the furnishing of services by said physician to women in the area of family planning, pregnancy tests, birth control, termination of pregnancy through abortion and related gynecological services. Plaintiff Ladies Center, Nebraska, Inc. brings this action pursuant to Rule 23(a)(b)(1)(A) and (b)(2) of the Federal Rules of Civil Procedure on behalf of all organizations, whether corporations, proprietorships, partnerships or unincorporated associations, which offer and provide facilities and support staff to physicians for the

furnishing of services by said physicians to women in the area of family planning, pregnancy tests, birth control, termination of pregnancy through abortion and related gynecological services in the State of Nebraska. The class is so numerous that the joinder of all such organizations is impracticable. There are questions of law and fact common to the class. The claims of the representative party are typical of the class. The representative party will fairly and adequately protect the interests of the class, and the parties opposing the class are acting on grounds generally applicable to the class, thereby making appropriate declaratory and injunctive relief with respect to the class as a whole. Prosecution of separate actions by or against individual members of the class could create a risk of inconsistent or varying adjudication with respect to individual members of the class which would establish incompatible standards of conduct under the Nebraska Criminal Code challenged sections.

14. Betty Roe brings this action through her next friend pursuant to Rule 23(a), (b)(1)(A) and (b)(2) of the Federal Rules of Civil Procedure on behalf of all pregnant women in the State of Nebraska who desire to terminate their pregnancy by abortion. The class is so numerous that the joinder of all such persons is impracticable. There are questions of law and fact common to the class. The claims of the representative party are typical of the class. The representative party will fairly and adequately protect the interests of the class, and the parties opposing the class are acting on grounds generally applicable to the class, thereby making appropriate declaratory and injunctive relief with respect to the class as a whole. Prosecution of separate actions by or against individual mem-

bers of the class could create a risk of inconsistent or varying adjudication with respect to individual members of the class.

15. Defendant Knowles is sued in his capacity as County Attorney of Douglas County, Nebraska, and as the representative of the class of all county attorneys of the various counties in the State of Nebraska pursuant to Rule 23(a), (b)(1)(A) and (b)(2) of the Federal Rules of Civil Procedure. Said defendant and class of county attorneys is so numerous that joinder of all members is impracticable. There exists substantial questions of law and fact common to the defendant class and the defenses of defendant Knowles are typical of the defenses of the defendant class. Defendant Knowles will fairly and adequately represent the interests of the defendant class of county attorneys. The prosecution of separate actions against individual members of the defendant class could create a risk of inconsistent or varying adjudication with respect to individual members of the defendant class which would establish incompatible standards of conduct for physicians presently performing or desiring to perform abortions in Nebraska.

16. The questions of law and fact in common to the class are: (1) Whether the challenged sections constitute an unconstitutional violation of a woman's fundamental right to receive nad a physician's right to perform, first and second trimester abortions, with no compelling state justification; (2) Whether the challenged sections place restrictions on women who seek abortions and physicians who perform abortions while not placing a similar restriction for other surgical procedures, including childbirth, creates an invidious classification and violates equal pro-

tection; (3) Whether the challenged sections whose purpose is to prevent the performance of abortions is the enactment into law of one religious belief concerning abortion in violation of the religious freedom clause of the First Amendment to the United States Constitution; (4) Whether the challenged sections infringe upon the rights of physicians to practice medicine in violation of due process of law; (5) Whether the challenged sections infringe upon the right of physicians to give, and their patients to receive, appropriate medical treatment and advice pertaining to the decision whether to terminate a pregnancy in violation of the First, Ninth and Fourteenth Amendments to the United States Constitution; (6) Whether the challenged sections are vague and/or over-broad; (7) Whether the challenged sections violate equal protection by regulating the performance of abortions while not regulating the performance of any other medical procedure; (8) Whether the challenged sections deprive physicians and their women patients of their rights to privacy in the physician-patient relationship, as protected by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution, by imposing sanctions upon the treatment of minors under eighteen years of age without parental notification; (9) Whether the challenged sections arbitrarily, capriciously and without rational basis or compelling state interest deprive plaintiff Ladies Center, Nebraska, Inc. of its rights to provide facilities and support staff to plaintiff Epp for the furnishing by him of services to women in the area of family planning, pregnancy tests, birth control, termination of pregnancy through abortion and related gynecological services; (10) Whether the challenged sections deprive minor women

under eighteen years of age of equal protection of the laws by treating similarly situated classes of pregnant women differently and discriminatorily with no compelling state interest or justification for such classification.

FACTUAL ALLEGATIONS

17. The Nebraska Criminal Code, Sections 28-325 to 28-345, inclusive, became effective and applicable to abortion procedures on January 1, 1979. On March 19, 1979, the Nebraska Legislature passed, and on March 22, 1979, the defendant Charles Thone signed into law, Legislative Bill 316 which amended and appealed certain of the above cited statutes. Particularly, Legislative Bill 316 amended Sections 28-326, 28-327, 28-329 to 28-331, inclusive, 28-333, 28-334, 28-342, 28-343 and 28-345. Legislative Bill 316 further repealed the original sections 28-326, 28-327, 28-329 to 28-331, inclusive, 28-333, 28-334, 28-342, 28-343 and 28-345. Legislative Bill 316 became effective March 22, 1979.

18. The challenged sections constitute the only legislation by the State of Nebraska regulating a surgical procedure.

19. Upon information and belief, defendants will seek plaintiffs' compliance with the provisions of the challenged sections and will cause criminal prosecutions to be instituted against plaintiffs for failure to comply.

20. Compliance with the challenged sections will cause irreparable injury, for which no adequate remedy at law exists, to plaintiffs and their patients, by depriving them of rights guaranteed under the United States Constitution and by precluding access to elective and medically necessary pregnancy termination procedures in Nebraska, which

will increase the physical and emotional risk attendant to the making and effectuation of the choice whether to carry a pregnancy to term or to terminate it by abortion.

21. Plaintiff Epp desires to give complete, safe and proper advice and treatment to his patients regarding the abortion decision. He is prevented from doing so, and restricted in his right to practice medicine consistent with his best independent medical judgment, by the challenged sections which subject him to regulation and criminal prosecution if he performs abortions in violation of any of the provisions of said sections. As a result, plaintiff Epp and members of the class of persons similarly situated are suffering and will continue to suffer irreparable injury for which they have no adequate remedy at law.

22. The challenged sections restrict and deny access to abortion. As a result, Betty Roe and the class of persons similarly situated will be deprived of fundamental constitutional rights and as a result will suffer irreparable injury for which there is no adequate remedy at law.

FIRST CAUSE OF ACTION
(SUBSTANTIVE DUE PROCESS)

23. Plaintiffs incorporate herein by reference as though set forth in full the allegations of Paragraphs 1 through 22.

24. The challenged sections deprive plaintiffs and the patients of plaintiff Epp of the following liberties without due process of law, in violation of the Fourteenth Amendment to the United States Constitution:

A. The right of women to fully and freely make and effectuate the decision to terminate their pregnancy, a

fundamental right of privacy guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

B. The right of a physician to practice medicine in accordance with his or her best medical judgment, a right guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

C. The right of a physician to give, and of women to receive, medical treatment and advice, in accordance with accepted medical standards, pertaining to the decision whether to terminate a pregnancy, rights guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

D. The rights of the plaintiff Ladies Center, Nebraska, Inc. to provide facilities and support staff to plaintiff Epp for the furnishing by him of services to women in the area of family planning, pregnancy tests, birth control, termination of pregnancy through abortion and related gynecological services, rights guaranteed by the First, Fourth, Fifth and Ninth Amendments to the United States Constitution.

E. The challenged sections are so vague and overbroad that they fail to give reasonable notice to physicians, minors under eighteen years of age or parents of the circumstances under which either parent or guardian notification may be obtained or denied and further fail to give reasonable notice to the plaintiffs of what conduct is proscribed by said sections.

SECOND CAUSE OF ACTION
(EQUAL PROTECTION)

25. Plaintiffs incorporate herein by reference as though set forth in full the allegations of Paragraphs 1 through 24.

26. The challenged sections deprive plaintiffs and the patients of plaintiff Epp of equal protection of the laws

in violation of the Fourteenth Amendment to the United States Constitution, because they unreasonably single out for regulation without a rational basis the abortion procedure, while all other comparable medical procedures are left unregulated.

THIRD CAUSE OF ACTION
(FREE EXERCISE AND ESTABLISHMENT)

27. Plaintiffs incorporate herein by reference as though set forth in full the allegations of Paragraphs 1 through 26.

28. The challenged sections violate the prohibitions of the First Amendment against laws respecting the establishment of religion and interfering with the free exercise thereof for the following reasons:

A. The purpose and effect of the challenged sections is to impede, impair and prevent pregnant women from obtaining abortions.

B. The challenged sections constitute enactment into law of one religious belief concerning abortions and the nature of the fetus and constitute the imposition of that religious view upon women who would not otherwise choose abortion in accordance with their religious or non-religious beliefs.

C. The challenged sections have no secular justification.

D. The enactment of this religious view into law has created and threatened further entanglement of church and state and fosters political divisions along religious lines.

E. The challenged sections discourage, impede and prevent women from obtaining safe, legal abortions in accordance with the different teachings of the religions

to which they adhere and with the dictates of their conscience.

F. The challenged sections force physicians, under threat of criminal penalties, to endorse and communicate to their patients one religious view regarding human life.

RELIEF PRAYED

WHEREFORE, plaintiffs pray that this Court;

A. Assume jurisdiction of this action;

B. Issue a temporary restraining order, preliminary injunction, and a permanent injunction, without bond, enjoining and restraining defendants, their employees, agents and servants from enforcing the challenged sections of the Nebraska Criminal Code;

C. Declare that the challenged sections of the Nebraska Criminal Code are violative of the rights guaranteed to the plaintiffs by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and are, therefore, void and of no effect;

D. Award plaintiffs their costs and attorney's fees pursuant to 42 U. S. C. Section 1988; and,

E. Enter such other and further relief as the Court deems appropriate, just and proper.

LADIES CENTER, NEBRASKA, INC., A Corporation; M. John Epp, M.D.; and BETTY ROE, through her next friend, BARBARA GAITHER, Plaintiffs.

BY /s/ Michael T. Levy
of LEVY AND LAZER

13322 Millard Avenue
Omaha, Nebraska 68137

Attorneys for Plaintiffs

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV79-L-85

WOMENS SERVICES, P.C., a Nebraska Professional Corporation, and G. WILLIAM ORR, M.D.,

Plaintiffs,

vs.

CHARLES THONE, Governor of the State of Nebraska; PAUL L. DOUGLAS, Attorney General for the State of Nebraska; and DONALD L. KNOWLES, County Attorney for the County of Douglas, State of Nebraska,

Defendants.

CV79-L-100

LADIES CENTER, NEBRASKA, INC., a corporation; M. JOHN EPP, M.D.; and BETTY ROE, by her next friend, BARBARA GAITHER,

Plaintiffs,

vs.

CHARLES THONE, Governor of the State of Nebraska; PAUL L. DOUGLAS, Attorney General for the State of Nebraska; and DONALD L. KNOWLES, County Attorney for the County of Douglas, State of Nebraska,

Defendants.

MEMORANDUM AND ORDER
(Filed April 20, 1979)

These are actions challenging the constitutionality of portions of the Nebraska Criminal Code concerning abortion. The 1977 Legislature of the State of Nebraska passed, as Legislative Bill 38, a series of sections, and

the 1979 Legislature amended some of them by Legislative Bill 316. A hearing has been had in both actions simultaneously on motions for a preliminary injunction. Ruling will now be made on these motions, as well as several procedural motions.

PRELIMINARY PROCEDURE MATTERS

Although there has been no motion to consolidate these two actions, my understanding is that counsel agree that they should be consolidated. Accordingly, that will be done. There is a motion to consolidate CV79-L-85 with an action between the same parties regarding L. B. 38, but I think the matters before me presently can more understandingly be handled prior to a consideration of that consolidation.

* * * *

The plaintiff Ladies Center, Nebraska, Inc. in CV79-L-100 requests certification of a class consisting of all organizations which offer and provide facilities and support staff to physicians for the furnishing of services by said physicians to women in the area of termination of pregnancy through abortion. I find that the class is so numerous that joinder of all such organizations is impracticable, that there are questions of law and fact common to the class, the claims of the representative party are typical of the class, the representative party will fairly and adequately represent the interests of the class, the parties opposing the class are acting on grounds generally applicable to the class, thereby making appropriate declaratory and injunctive relief with respect to the class as a whole, and the prosecution of separate actions would

create a risk of inconsistent of varying adjudication with respect to individual members of the class. Accordingly, such a class will be certified.

• • • •

IT HEREBY IS ORDERED:

1. That *Womens Services v. Thone,* CV79-L-85, and *Ladies Center v. Thone,* CV79-L-100, are consolidated;

• • • •

5. That the motion of the plaintiff Ladies Center, Nebraska, filing 10 in CV79-L-100, is granted and a class of plaintiffs consisting of all organizations which offer and provide facilities and support staff to physicians for the furnishing of services by said physicians to women in the area of termination of pregnancy through abortion is hereby certified;

• • • •

Dated April 20, 1979.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIVIL ACTION NO. 78-L-289

CIVIL ACTION NO. 79-L-85

WOMENS SERVICES, P. C., a Nebraska Professional Corporation, et al.,

Plaintiffs,

vs.

CHARLES THONE, Governor of the State of Nebraska, et al.,

Defendants.

CIVIL ACTION NO. 79-L-100

LADIES CENTER, NEBRASKA, INC., a Corporation, et al.,

Plaintiffs,

vs.

CHARLES THONE, Governor of the State of Nebraska, et al.,

Defendants.

ORDER ON PRETRIAL CONFERENCE

Pretrial conference was held on the 3rd day of August, 1979. Appearing for the parties were: For the plain-

tiffs, Lawrence I. Batt and Michael T. Levy; for the defendants, Jerold V. Fennell, Assistant Attorney General, and Henry L. Wendt, Douglas County Deputy Attorney.

• • • •

B. Uncontroverted Facts:

The parties have agreed that the following facts may be accepted as established facts for the purposes of the instant case only:

• • • •

11. The plaintiff Ladies Center, Nebraska, Inc., is a Florida corporation authorized to do business in the State of Nebraska which offers facilities and support staff to physicians for the performance of family planning, pregnancy tests, birth control, termination of pregnancy through abortion and related gynecological services. The challenged sections subject physicians who perform abortions and facilities which provide supportive services to such physicians to regulation and criminal prosecution should they fail to comply with any of the challenged sections.

• • • •

Dated August 3rd, 1979.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

APPENDIX D

LINDA KOCH

having been first duly sworn, testified as follows:

Direct Examination
By Mr. Levy

Mr. Levy: By way of introduction, the parties have agreed the following facts are true:

Plaintiff Ladies Center, Nebraska, Inc., is a Florida corporation authorized to do business in the State of Nebraska which offers facilities, support staff and physicians for performance of family planning, pregnancy tests, birth control, termination of pregnancy through abortion and related gynecological services.

By Mr. Levy:

Q. Are you affiliated with plaintiff Ladies Center, Nebraska, Inc.?

A. Yes, I am.

Q. In what capacity or capacities?

A. My official titles are executive director and assistant secretary.

* * * *

Q. How long have you held the positions of assistant secretary and executive director?

A. Since March, 1975 to the present.

* * * *

Q. Miss Koch, I believe my last question was and you have answered that you have held the positions of executive director and assistant secretary since approximately March, 1975?

A. Correct.

Q. Since Ladies Center, Nebraska began to provide the services that I described to you a few minutes ago, has any party, other than yourself served as executive director or assistant secretary?

A. No.

Q. Ladies Center, Nebraska is now located in Omaha is that correct?

A. Yes, it is.

Q. And always has been?

A. Yes.

Q. Your general duties and responsibilities as executive director remained substantially the same since March, 1975?

A. Yes.

Q. Could you generally describe the responsibilities and duties that you perform?

A. My general responsibilities include the overall management of the facility which supplies a staff to physicians, and detailing that, would include implementing and carrying out policy procedures for patients and personnel. I am responsible for the recruitment, orientation, continuing education, periodic evaluation of employees. I supervise all clinical activities. And I do pre-abortion counseling.

Q. Could you generally describe what facilities and support staff are provided by Ladies Center to physicians in the areas I described in my statement?

A. Ladies Center, Nebraska, Incorporated supplies an outpatient surgical facility with support staff to physicians. The support staff includes myself, the director, secretary-receptionist, telephone appointment assistant, lab technicians, counselors, sterilizing room nurse, operating room nurse, preoperative nurse and recovery room nurse.

Q. At present, Miss Koch, the physician who performs pregnancy terminations at your facility is Dr. Epp?

A. Yes.

Q. John Epp from Lincoln?

A. Yes.

Q. Have you in the past provided physicians and support staff to other physicians besides Dr. Epp for the performance of pregnancy terminations and gynecological services?

A. Yes.

Q. Could you give me the number of days per week that pregnancy terminations are performed at Ladies Center?

A. We perform abortions three days a week.

Q. Now are these the same days per week or do the days vary from week to week?

A. The days vary from week to week for three weeks. Each three week period is basically the same schedule.

* * * *

Q. Miss Koch, in connection with your duties since 1975 are you aware of the general routine regarding scheduling of patients—

A. Yes.

Q. —between when they make the initial call for an appointment for termination and are actually scheduled?

A. Yes.

Q. Do you supervise the scheduling or it's done under your control?

A. Yes.

* * * *

Is there any reason why you cannot—I believe the question was: Who filled out the abortion document, the abortion state reporting document?

• • • •

A. It is filled out by a full time clerk, only she is an LPN.

• • • •

CONSTANCE ROWE (Ms. Constance)

having been first duly sworn, testified as follows:

Direct Examination
By Mr. Fennell

Mr. Fennell: The record should reflect that this witness has asked not to have her last name disclosed. I believe she is identified in the pretrial order as Constance Doe or Roe. She is the only witness whose first name is identified in the pretrial order as Constance. I will address her in my examination as Ms. Constance.

The Court: Very well.

• • • •

Q. When did you begin working at Ladies Center, Inc.?

• • • •

A. I think it was July, 1975; maybe June. I don't know the exact date. It was June or July of 1975?

Q. And did Linda Koch hire you?

A. Yes, she did.

Q. And did you meet with Dr. Epp before you began working?

A. Yes.

Q. For how long?

A. I don't remember.

Q. Did Linda Koch explain to you what your duties were to be?

A. We discussed it.

Q. Had you ever done any abortion counseling before you began working at Ladies Center?

• • • •

A. No; not before I started working there.

Q. Did you receive any instructions on what your duties were going to be?

A. I had specific guidelines of what needed to be covered. In regards to filling in the gaps, it was pretty much up to me what we discussed outside those guidelines.

Q. What were those guidelines?

A. Explain the procedure to them, alternatives, contraception. That is all I can think of right now.

Q. Did you also discuss complications?

A. Yes.

Q. In what setting were you performing this work?

A. In a group setting or individual setting.

Q. And what do you describe as a group setting?

A. A group of 5 to 7 patients, plus myself.

Q. And did you also—or have you also performed individual counseling?

A. Yes, I have.

Q. And was that at the request of the patient?

A. Yes.

• • • •

Q. Do you know the time periods patients arrive at the clinic.

A. There are three times during the day they arrive. 8:30, 10 and 11.

Q. The patients that arrive at 8:30 do you see those patients in a group counseling session at 10 o'clock?

A. Generally.

Q. Would there also be patients that arrive at a later session?

A. Yes.

• • • •

Q. The first patients you meet with at 10 o'clock come in at 8:30 in the morning. Is that correct?

A. Generally.

Q. And when do you meet with your next group of patients?

A. When they are finished talking with Linda Koch, the director and they are finished with the lab work.

Q. And you have finished with your first group counseling sessions?

A. Yes.

Q. And how is that group identified? Is there any identity to that group?

A. No.

Q. Would those be the ones that arrived at 10 o'clock?

A. They would have no specific label.

Q. I am not asking you for a label; but would it be those people who arrive at 10 o'clock?

A. Essentially.

Q. And that would be true of the people that arrived at 11 o'clock, the final session?

A. Yes.

Q. If a patient arrived at 8:30 and you do not see them until 10 o'clock, are you aware of what takes place between that time?

A. I know what needs to be done in that interval of time.

• • • •

Q. What needs to be done?

• • • •

A. The patient fills out a chart, sees Linda Koch, does the lab work. After we have them all ready then I get the group and start counseling.

• • • •

The Court: All you are really asking is what Linda Koch has told this witness what Linda Koch does?

Mr. Fennell: Correct.

The Court: She may answer that.

A. A variety of things that she goes over; the consent form, discussion of complications, a medical history; things about the abortion. Essentially that is all I can remember.

Q. Have to your knowledge the patient signed a consent form before they visit with you in your counseling session?

A. Yes, they have.

• • • •

Q. You testified that they sign a consent form before they come to you?

A. Yes.

Q. Do you discuss in your counseling session that consent form?

A. Not the actual consent form, no.

Q. Do you mention or discuss with them, or make any statements regarding their decision to have

an abortion as being final as of that time when you initially start your counseling session?

A. The information I give the patient is in my counseling with them. They have the option to leave at any point in time up until the procedure is being performed.

• • • •

Q. What do you do when you initially start your conversation? When people come in and you introduce yourself, what do you do?

A. When the patients come in I inform them what I will be doing. I identify patients by first names, give information about what alternatives she has.

Q. What alternatives do you mention?

A. If they choose to they could go to full term delivery, abortion, adoption. Essentially that.

Q. Is that in a group setting?

A. Yes, in group setting.

Q. So if one person asked about options, you mentioned them?

A. Yes.

Q. Then what did ycu do?

A. After that I leave the room, review charts, have the nurse prepare medications. And then we go back in.

• • • •

Q. Then what do you do?

A. I go over essentially what will be happening to the patient from the time they are in my counseling session until the time they leave; also discussing complications, following instructions, contraception and then the abortion procedure.

• • •

MILFERD JOHN EPP

having been first duly sworn, testified as follows:

Direct Examination

By Mr. Levy

Q. You have been identified as Dr. John Epp, is that true?

A. That's right.

Q. Doctor, you are one of the plaintiffs in this action?

A. Yes.

Q. Your occupation is that of physician?

A. Yes.

Q. Are you licensed to practice medicine in the State of Nebraska.

A. Yes.

Q. Will you give us the year you obtained your license?

A. February, 1956.

Q. In what area of medicine do you practice?

A. I practice emergency medicine in Lincoln, Nebraska and I do first trimster abortions and office gynecology in Omaha.

Q. Are you board certified or eligible in any specialty?

A. Board certified.

Q. In what specialty?

A. Obstetrics and gynecology.

Q. With respect to your area of practice in performing first trimester abortions and office gynecology, where do you practice?

A. At 120 South 41st in Omaha.

Q. Doctor, the parties have agreed that plaintiff, Ladies Center of Nebraska, Inc., offers facilities and support staff and physicians for the performance of family planning, pregnancy tests, birth control, termination of pregnancies through abortion and related gynecological services.

Are you one of the physicians or the physician presently who provide these facilities and support staff by Ladies Center?

A. Yes, sir.

• • •

Q. Is the staff at Ladies Center subject to your supervision?

A. Yes, it is.

Q. And control?

A. Yes, it is.

• • •

Q. Doctor, what is your connection with Ladies Center, Inc.?

A. I am the medical director.

Q. And are you a salaried employee?

A. No, I am not.

Q. Are you a corporate officer?

A. No, I am not.

• • •

Q. When did you begin your term, if I may use the term "association" at Ladies Center? Would you describe what that association is?

A. I am a physician practicing the type of medicine which was previously described at the Ladies Center. I am the medical director of the Ladies Center. They are an agent which provides me with services of the space, staff and administrative and medical equipment.

They collect monies from patients that I perform services for. That's my relationship.

* * *

Q. Dr. Epp, you do no scheduling at the clinic itself, do you?

A. I do no scheduling.

Q. And in connection with your previous testimony —withdraw that.

The scheduling is all handled by administrative office personnel?

A. That's right.

* * *

Your Honor, the plaintiffs would offer the balance of Defendants' Exhibit No. 2.

* * * *

Mr. Fennell: Your Honor, I object to Plaintiffs' offer of the remainder of Defendants' Exhibit 2; it was not identified in the pretrial list of plaintiffs' exhibits.

* * * *

The Court: The objections are overruled. Exhibit 2 will be received in its entirety.

* * * *

EXHIBIT 2

THE LADIES CENTER, NEBRASKA, INC.

Procedural Manual

The Ladies Center, Nebraska, Inc.

Personnel Policies

Health Team Component

The Ladies Center, Nebraska, Inc. provides facilities and support staff to physicians for the furnishing of

services by them to women in the area of family planning, pregnancy tests, birth control, termination of pregnancy through abortion and related gynecological services. The staff includes qualified, professional nurses, nursing assistants and counselors. The laboratory, located within the facility, employs a licensed technician to perform the laboratory tests required by the physicians.

Inservice Education

A continuing education program is provided by the Ladies Center, Nebraska, Inc. All Staff members are required to attend, and staff members are encouraged to participate in planning and presenting these programs.

Employee Evaluation

Periodic assessment of performance and recommendations for improvement are conducted by or under the supervision of the physicians for all members of the staff.

Employee Accident/Injury

Any injury sustained by an employee on premises is reported to the clinic director and documented. Appropriate emergency care and/or referrals are made by the physician.

Patient Policies

Ineligibility and Referral

Medical eligibility for a first trimester outpatient-abortion is determined by the examining physician based on the medical history and physical findings. A woman who is found to be ineligible for this procedure is provided with appropriate information, counseling and referral. The suction currettage abortion is performed only with the informed consent of the patient. If a patient is determined by the staff or physician, to be psychologically, emotionally or physically unprepared for an outpatient abortion with local anesthesia,

or if a patient manifests strong ambivalence about terminating her pregnancy, the staff or physician refers her to an appropriate health care agency for further counseling.

Laboratory Services

Each patient at The Ladies Center, Nebraska, Inc. receives the following laboratory tests:

Pregnosticon urine test for pregnancy
Hemoglobin
Hematocrit
Serology (VDRL)
Blood group and Rh factor
Gross pathologic tissue examination by physician
Gonococcal Smear

In addition, the following laboratory tests are available and provided to patients on an individual basis when indicated.

Rh Immune Globulin compatibility test and Du detection test if patient is Rh negative

Pap Smear

Microscopic pathologic tissue examination when deemed necessary, by licensed pathologist

Visitors

The Ladies Center, Nebraska, Inc. encourages family members and/or friends to accompany patients to and from the facility. While visitors are not permitted in patient care areas, counseling is provided when requested or needed, and all visitors are kept informed of the patient's progress during her stay at the facility.

Medical Records

The Ladies Center, Nebraska, Inc. maintains a complete record for each patient admitted to the facility. These records are privileged and confidential, and may not be released without written consent of the patient.

In addition, no information about a patient is given by telephone. Employee records are also confidential.

Length of Stay

Each patient remains in the recovery room area until the physician discharges her. If a patient insists on leaving the facility prior to her medical discharge, she must sign a release form.

Secretary/Receptionist

DEPARTMENT

Administration

RESPONSIBLE TO

Physicians/Clinic Director

JOB SUMMARY

Since the receptionist is the first staff member to meet the patient and her visitor(s), she influences the patient's initial impression of the clinic. Therefore, she should be able to communicate effectively, and sensitively with patients.

FUNCTIONS

1. Greets the patient and her visitor(s) and determines the nature of the visit; e. g., scheduled for termination of pregnancy, diagnostic pregnancy testing, post-operative examination, etc.
2. Assists each patient with the admission procedure, i. e., patient chart and forms.
3. Informs the patient's visitors of the patient's progress during her clinic stay.
4. Handles all incoming and outgoing telephone calls, and contacts staff members within the clinic as necessary.

5. Maintains a daily register of patients.
6. Performs other functions as assigned.

QUALIFICATIONS

1. Ability to assist with the patient flow and refer patients and visitors to appropriate staff members as indicated.
2. Ability to communicate effectively.
3. Ability to work under pressure and remain pleasant and efficient.

Telephone Appointment Assistant

DEPARTMENT

Administration

RESPONSIBLE TO

Physicians/Clinic Director

JOB SUMMARY

The Appointment Assistant schedules clinic appointments by telephone, and records the pertinent information on an appointment book. Tactfulness and calm, courteous approach is essential in order to make the patient feel as comfortable as possible.

FUNCTIONS

1. Answers the telephone when a person calls The Ladies Center Nebraska, Inc. to schedule an appointment and provides supportive counseling.
2. Screens for eligibility.
3. Provides specific instructions for the patient.
4. Discusses the clinic fee and makes arrangement for payment (after discussion with clinic director).
5. Records all pertinent information on an appointment book.

QUALIFICATIONS

1. Must be able to communicate effectively by telephone.
2. Must demonstrate sensitivity to women's attitudes and feelings toward abortion.
3. Training and orientation is provided on-the-job.

Operating Room Nurse

DEPARTMENT

Nursing

RESPONSIBLE TO

Physicians/Nursing Supervisor

JOB SUMMARY

The Operating Room Nurse provides emotional support to the patient during the abortion procedure. She assumes responsibility for nursing care in the procedure room, implements aseptic technique when indicated, and assists the physician during the suction curettage procedure.

FUNCTIONS

1. Screens each patient record for pre-operative completion and for significant medical and personal history.
2. Attends the patient throughout the abortion procedure providing emotional support and reassurance.
3. Assists the physician in the role of circulating nurse during the abortion procedure.
4. Takes vital signs and administers IM medications to the patient when necessary.
5. Performs as a member of the health team during an emergency situation.

6. Accompanies the patient to the recovery room when the procedure is completed.
7. Records pertinent nursing information on the patient's chart regarding the abortion procedure, e. g., vital signs, medications, patient reactions.
8. Administers pre-operative medications as ordered by the physician.
9. Between procedures assists in pre-operative work-up.
10. Places fetal tissue in labelled Formalin container.
11. Assists with the inventory of supplies.
12. Cleans equipment and re-stocks procedure room daily.
13. Performs duties in other patient areas as assigned.

QUALIFICATIONS

1. Ability to assess the condition of the post-operative patients.
2. Skill in providing emergency care nursing.
3. Ability to convey emotional support, warmth and understanding.
4. Graduation from an accredited School of Registered Nursing, or Certificate from Medical Assistant School, with current professional license in the state of employment.

Nursing Supervisor/Sterilizing Nurse

DEPARTMENT

Nursing

RESPONSIBLE TO

Physicians/Clinic Director

JOB SUMMARY

The nursing supervisor is responsible for directing the nursing staff in implementing patient care poli-

cies and procedures. She will also be responsible for coordinating the in-house continuing education program working in conjunction with the physician and the Clinic Director.

The Sterilizing nurse is responsible for adequate cleaning and sterilization of all instruments and equipment, and for distributing this equipment to patient care areas.

FUNCTIONS

1. Nursing supervisor and sterilizing nurse positions are synonomous.
2. Collects, washes, wraps, sterilizes, and labels instrument trays, individual instruments, and tubing.
3. Makes sure that sterilizing room (scrub area) is clean and stocked with supplies.
4. Keeps inventory of supplies, and re-orders them through the Clinic Director.
5. Reports any malfunctioning equipment to the physician or Clinic Director for immediate action.
6. Performs related functions as assigned.

QUALIFICATIONS

1. Shall be a registered nurse.
2. Knowledge of sterilization process and techniques of sterilization.
3. Knowledge of proper functioning of equipment.
4. Training is provided on-the-job.

Counselor

DEPARTMENT

Counseling

RESPONSIBLE TO

Physicians/Clinic Director

JOB SUMMARY

The counselor provides emotional support to the patients during a critical period of her clinic stay. She explains the suction curettage abortion procedure, reviews post-operative orders and routine and special instructions, and discusses birth control methods in depth, in a small group setting. She provides an informal discussion period during which the patients can express their feelings and ask questions. She screens patients for special counseling. The emphasis during this counseling session is on informal discussions and informed family planning and a good program of regular health care.

FUNCTIONS

1. Observes patients for physical and/or emotional symptoms during the postoperative counseling session.
2. Gives a detailed explanation of the suction curettage abortion procedure, using visual aids in a small group setting (or individually if indicated); discusses expected feelings and reactions to the procedure, and encourages patients to share feelings and concerns.
3. Reviews postoperative instructions and stresses the importance of follow-up care. Postoperative instructions are written.
4. Helps the patients to select a contraceptive method by discussing the advantages and disadvantages, effectiveness and safety, convenience and cost, of each method. Visual aids are used in contraceptive information and an information sheet is supplied to each patient.
5. Stresses the importance of regular health care (e.g., breast self-examination and pap smear); reviews the menstrual and reproductive cycles.
6. Provides further special counseling when indicated, to individual patients.

7. Checks to see that preoperative medication ordered by the physician has been administered and recorded by a member of the nursing staff.
8. Records unusual patient reactions and responses to preoperative and/or special counseling and makes recommendations to clinic director for additional counseling.
9. Performs other related functions as assigned.

QUALIFICATIONS

1. Sensitivity and awareness of an individual's response in a group setting, with the ability to screen patients who are not candidates for group counseling and/or outpatient suction curettage abortion.
2. Good interpersonal skills, with an ability to give emotional support.
3. Ability to create an atmosphere in which patients can express feelings.
4. Courses and/or experience in family planning, psychology, sociology, counseling and group dynamics, is desirable; knowledge of physical and psychological effects of pregnancy and its termination, as well as familiarity with available methods of contraception, is necessary.

Diagnostic Pregnancy Testing

A woman may come to The Ladies Center, Nebraska, Inc. for a diagnostic pregnancy test. There is no charge for this service and no appointment is necessary.

1. If she telephones The Ladies Center, Nebraska, Inc. in advance, the woman is advised to bring her first morning urine specimen to the clinic. If she does not bring a specimen with her, a fresh specimen is obtained at the clinic.

2. If the pregnancy test is negative, the woman is advised to return to the clinic in two weeks for a repeat pregnancy test if she has had no menses. After the second negative pregnancy test and continued absence of menses, the woman is referred to a physician or seen in the clinic's general gynocology clinic for further evaluation. A woman whose pregnancy test is negative is advised to use an interim birth control method until the pregnancy test results are conclusive.

3. If the pregnancy test is positive, the woman is counseled concerning the options available to her, e.g., continuation of pregnancy, adoption (if applicable), or termination of pregnancy. *No discussion is initiated by the staff members* who give the results of the test, but information is openly given when the patient indicates she wishes this information. If the woman chooses to have an abortion at The Ladies Center, Nebraska, inc. and is eligible for an outpatient suction curettage procedure, an appointment is scheduled.

4. The woman who is ineligible for an outpatient abortion is given referral information on 2nd-trimester abortion facilities.

Appointment Scheduling

Counseling begins as early as the initial telephone call with a prospective patient. The telephone counselor offers emotional support as she discusses options and conveys acceptance of the patient's decision.

Screening for Eligibility

1. LMP (Last Menstrual Period)

2. a. The woman is asked to give the date of the first day of her last menstrual period. She is asked

whether this period was normal, e. g., amount and duration of flow.

b. If the LMP is less than 12 weeks, an appointment can be scheduled.

c. If the LMP is more than 12 weeks, the alternate abortion procedures for advanced gestation are explained, options are discussed, and if the woman desires, a referral is made.

2. Medical History

The woman is questioned for possible contraindications for an outpatient abortion procedure. If there is any doubt about eligibility, the physician is consulted.

Patient Instructions

1. The woman is given a specific appointment time between the hours of 8:30 and 11:00 a.m.
2. The woman is asked to eat breakfast, but no coffee, before her appointment.
3. The woman is asked to bring her first morning urine specimen to the clinic.
4. The woman is asked to bring a sanitary belt and pad.
5. The woman is asked to bring a bathrobe.
6. The woman is advised to take any prescribed medication, no other drugs or alcohol prior to the appointment.
7. The woman is advised to have someone arrange to go with her upon leaving the clinic after the procedure.
8. The woman is advised that she will be in the clinic for approximately four hours.
9. The abortion procedure is explained to her.
10. The woman is advised of the fee for the procedure which includes all laboratory and medication costs.

Admission of Patient

1. The patient is greeted by the receptionist, given a chart, and asked to complete the personal and medical history form.

The receptionist is available to assist the patient with completion of forms, and to explain their purpose.

2. The patient is escorted to the laboratory by the lab technician.

3. The patient is then interviewed by the clinic director. The director checks the medical history and makes recommendations to other staff members for special instructions. The director discusses testing that will be done, and notes intake of medications, medical complications, explains a follow-up examination is necessary and will make referrals if the patient has no physician, etc. This interview may include family members or friends if the patient so desires.

4. All visitors are asked to remain in the waiting room. They are given a form explaining the care which is provided each patient of The Ladies Center, Nebraska, Inc.

5. The director is available to provide additional information to visitors after the patient leaves for the patient care area, if the visitors request such.

Laboratory Tests

The patient is escorted by the lab technician from the waiting room to the patient care area. She is asked to give a urine sample for analysis and then goes to the laboratory where the laboratory technician draws two blood samples.

The following laboratory tests are completed for each Ladies Center patient:

1. *Urinalysis*

   a. Pregnancy test: The urine sample is tested for pregnancy by the Pregnosticon method. If there is any doubt about the validity of the result, a two-hour UCC test is performed, if requested by the physician.

2. *Blood type and Rh factor*

   The blood sample is typed according to the ABO grouping and Rh factor.

   a. Du Test: For each Rh negative patient, a DU test is performed. If the DU is positive, the anti-Rh globulin is not needed by the Rh negative woman.

   b. Anti-Rh Globulin Cross-Match: The blood sample of the Rh negative woman is tested for compatibility with the anti-Rh globulin, a special form of human immune gamma globulin before Gamulin is administered.

3. *Hematocrit*

   This test measures the percentage of red blood cells in the blood.

   Acceptable range: 35-45%.

4. *Hemoglobin*

   This test measures the amount of iron in the red blood cells. The test is correlative to the hematocrit but determined independently; an anemia unrecognized by one test may be recognized by the other.

   Acceptable range: 11-16 Gm.

5. *Serology* (VDRL)

   This test determines current or previous syphilitic infection. The testing is done by the county. If the clinic is advised of positive reactions they are counseled and referred to the VD clinic for further tests.

NOTE: Any abnormal laboratory findings are brought to the attention of the physician. Special counseling is provided as needed.

Rh Factor Counseling

In addition to the common classification of blood types, A, B, AB, and O, blood is also classified according to the presence of the Rh factor. The Rh positive indicates the presence of this factor while Rh negative indicates that the factor is absent.

1. Distribution of the Rh factor

   Approximately 85% of the American population is classified as Rh positive. The remaining 15% is therefore termed Rh negative. There is, however, a racial distribution for this genetic trait; Oriental people are rarely Rh negative, about 5% of the black population is Rh negative, while as many as 20% of the white population, particularly those of Western European extraction, is Rh negative.

2. Pregnancy and the Rh negative Woman

   The Rh factor is important when a woman becomes pregnant, if she is Rh negative and the man is Rh positive. In this instance, it is likely that the fetus will inherit the dominant Rh positive trait. When the woman is Rh negative and the fetus is Rh positive, there is a potential blood incompatibility.

3. Effects of Antibody Formulation

   The problem arises because it is rather common for a small amount of fetal blood to enter the blood stream of the pregnant woman. In effect, this amounts to a small blood transfusion, which usually occurs very late in pregnancy or at the time of delivery, miscarriage or abortion. The amount of antibody formation on initial exposure varies in individ-

ual women. In the sensitized women, with each successive pregnancy, increasing amounts of antibodies are formed. Thus, in the second or third pregnancy, the woman's antibodies begin to destroy the red blood cells of the fetus prior to delivery. The resulting condition (hemolytic disease of the newborn) is very serious. When the condition is severe enough, an exchange transfusion is required to replace the infant's blood. This procedure has risks and is not always effective.

4. Prevention of Antibody Formulation

   A special protein product called Anti-Rh Globulin (a form of immune gamma globulin, Rhogam or Gamulin Rh) has been developed to prevent the development of these antibodies by combining with the Rh antigen received from fetal red blood cells.

Preoperative Counseling

Both individual and group counseling are provided preoperatively. Group counseling is beneficial to some patients because it allows them to share the experience. Individual counseling, however, may be indicated, especially for patients who are unusually upset, fearful, or ambivalent. During both group and individual counseling reassurance and support are provided since this is generally recognized as the most anxious phase of the patient's stay.

The counselor screens each patient's personal and medical history to discover any unusual problems. If a patient has any unusual physical or emotional problems, she is given special counseling on an individual basis.

During the preoperative counseling session, an overview of the patient flow pattern is presented so that the pa-

tient will know what to expect during the remainder of her stay at the clinic. Each patient, or group of patients, then receives a detailed explanation of the suction curettage abortion and the sensations she may experience during the procedure.

For example, the patient is told that when she goes into the operating room, the physician will perform another pelvic examination to reconfirm her pregnancy and to determine the position of her uterus. The nurse will cover the perineum with a sterile drape, the speculum (which may be cold) will be inserted into the vagina and an antiseptic solution will be used to cleanse the area (this may also be cold). Local anesthesia is applied as a paracervical block. Since there are relatively few nerve endings in the cervix, this is usually felt as pressure, not pain. The local anesthesia takes effect within a few minutes and will help to reduce any cramping felt during the procedure. The doctor will dilate the cervix, this is in order to insert the small plastic suction tip into the uterus. The suction tip is then connected to the suction machine, and the doctor gently suctions the lining from the uterus. Finally, (s)he will insert another instrument, a curette, which is used to gently scrape the walls of the uterus to make sure that the uterus is empty.

The patient is told that during the dilating of the cervix the suctioning and curetting, most women experience mild, moderate, or sometimes hard cramping, briefly in the lower abdomen. She is advised to relax as much as possible and to let the operating room nurse and the physician know what she is feeling during the procedure.

5. Administration of Anti-Rh Globulin

For the substance to be fully effective, a woman must receive an injection within 72 hours after the first miscarriage, abortion, or delivery, and following the termination of each subsequent pregnancy. The sooner the injection is given folowing the termination, the less likelihood there is that the woman will develop sensitivity to the fetal red blood cells.

6. Indications

The following conditions must be present for the administration of anti-Rh globulin to be considered beneficial:

a. The woman must be Rh negative.

b. The fetus must be Rh positive. (Since it is impossible to determine the blood type of the fetus, it is assumed that the dominant trait exists.)

c. A cross-match must show that the woman has not already developed significant antibody formation.

7. Recommendations

Some Rh negative women do not develop antibodies, but because there is no method of determination when a pregnancy is terminated during the first trimester, all Rh negative women should receive the anti-Rh globulin.

a. All Rh negative women are advised to receive the anti-Rh globulin to prevent antibody formation after the termination of each pregnancy. A single injection of ¼ cc of Immune Globulin-HypRho-D is given to prevent incompatibility in future pregnancies.

b. Even if no future pregnancies are planned, is it advantageous to avoid the development of these antibodies. If a woman needs a blood transfusion in the future, it is much simpler to find compatible blood if she does not have excessive antibodies in her blood.

8. Effects of Intramuscular Injection

There may be some tenderness or soreness at the site of the injection. Allergic reactions are not expected but could occur. An occasional patient has shown a systemic reaction manifested by a low grade fever, but generally, reactions are confined to the injection site, and are infrequent and mild.

The counselor reviews the printed postoperative instructions which the patient has been given. She explains that, after a suction curettage abortion, the cervix remains dilated for about three weeks; therefore, the patient is instructed not to insert anything into her vagina, because of the possibility of infection. To prevent infection, the patient should not, during the next three weeks, have sexual intercourse. Also, during the same postoperative period, she should not use tampons for vaginal bleeding; she should take showers or sponge baths, but tub baths and swimming are not advised, nor are douches, feminine sprays or baby powder applied to the perineal area. The patient is instructed to wipe herself from front to back, after going to the bathroom, to avoid infection.

The patient is instructed to take her temperature each day for a week, and to call the clinic if it is 100.4 or higher. If she takes aspirin or other medications for cramping, she is instructed to take her temperature before taking the medication since this type of medication lowers the body temperature. The patient is taught to read the thermometer if she is not familiar with this procedure.

The counselor assures the patient that, although the symptom of morning sickness will disappear immediately, she may temporarily continue to experience breast tenderness, breast engorgement and leaking around the nipples, as

well as frequency of urination. She may resume her normal pattern of exercise and diet, but should not take any medications except those prescribed by a physician. It is explained that it is not unusual to feel the need for additional rest and sleep, as the tension and stress of pregnancy disappear. The patient is also informed that her body will be undergoing hormonal changes and that she may expect her emotions to be labile.

The counselor explains that bleeding and cramping vary in individual women; and that immediate postoperative bleeding and/or staining is the result of the suction curettage procedure and not a menstrual period. Postoperative bleeding may be absent, scant or moderate, is sometimes accompanied by clotting and/or lower abdominal cramping and may last for two weeks. The patient is asked to phone the clinic if her bleeding is heavier than the heaviest normal menstrual flow, or if bleeding continues beyond 15 days. She is told that a normal period should begin in four to 10 weeks. The counselor stresses that it is possible to conceive again, as soon as the patient resumes intercourse. Therefore, if she does not desire another pregnancy, she should use a birth control method whenever she has intercourse. The patient is instructed to see a physician in 3 weeks for a postoperative examination and to get a prescription for a reliable birth control method. If she does not have a private physician, she is given an appointment to return to The Ladies Center, Nebraska, Inc. for her follow-up examination.

The counselor reviews contraception, explaining the importance of family planning, and the effectiveness, safety, convenience and cost of available methods.

The birth control pill is generally considered the most effective method of contraception, if taken daily as prescribed. Samples of birth control pills are shown to the patients, and the counselor explains that these preparations contain estrogen and progesterone and are designed to prevent the release of an egg from the ovary. The patient is told about contradictions for using oral contraception, dosage variations, advantages, disadvantages and possible side effects. She is advised to see her physician routinely every six months, to report immediately any special problems which arise, to do a monthly breast self-examination, and to have a pap smear done every six months.

Several intrauterine devices are shown to the patients and the IUD is discussed as another safe method of birth control, perhaps slightly less effective than oral contraceptives. The IUD differs from other methods of birth control in that the woman has little responsibility (except for self-examination) for its effectiveness. The IUD is generally inserted into the uterus by a physician at the time of the patient's menstrual period, because the cervix is more dilated and the device can be inserted more easily. The patient is informed of possibly physical symptoms during insertion of an IUD. It is explained that the first few menstrual periods may be heavier in flow, and that the patient may experience some cramping, spotting or backache between periods for several months. The patient is shown diagrams or actual samples of IUD's available, including those coated with copper. The counselor stresses the importance of seeing the physician every six months for routine follow-ups, and explains that IUDs do need to be replaced periodically.

The diaphragm method of birth control is discussed. The patient is shown a diaphragm, how to use contraceptive cream or jelly in combination with it, and how to insert it into her vagina. She is instructed when to insert it, how long to leave it in place, and the advantages and disadvantages of this method and how to insert additional cream or jelly if intercourse occurs more than once in seven to eight hours.

A less effective method of birth control is the combination of contraceptive foam and the condom. The patient is shown how to use this method, but it is stressed that the foam/condom method is best used as a temporary means of birth control.

A vaginal spermicide method, the rhythm method and the condom method are discussed and illustrated in detail; however, the patient is advised that these methods, as well as coitus interuptus and douching, are not reliable methods of birth control, and not recommended by the clinic.

Patients are given information on voluntary sterilization (for both women and men), a permanent method of contraception.

In addition to open discussion, models and diagrams are used. Actual samples of each method are passed around the group and literature is given to each patient on all methods of birth control discussed. The use of visual aids gives each patient greater knowledge and understanding of all the various methods available to her.

A follow-up information sheet is given to each patient on which is asked that the patient record her impressions of The Ladies Center, Nebraska, Inc. She is asked to suggest

anything not provided by the Ladies Center, Nebraska, Inc. and which she thinks might be helpful to other patients. This form includes follow-up medical questions, the patient is asked to mail back the form in three weeks.

At the conclusion of the counseling session the patients are escorted to the pre-operative room.

Special Counseling

Laboratory Results

The laboratory tests results are made available to the physician prior to the procedure. If any of the findings are abnormal, (s)he evaluates their significance when (s)he performs the physical examination to determine the patient's eligibility for an out-patient abortion. The nurse will assist in the interpretation of these results in order to help the patient understand their significance to her health.

If the laboratory test results indicate an Rh negative factor, the patient is counseled about this finding and the need for Gamulin is stressed. Gamulin is provided at no additional cost. If the patient wishes to receive Gamulin, Gamulin is administered to the patient in the recovery room after the procedure. If the patient refuses Gamulin, she must sign a release form.

If the laboratory findings reveal a positive Serology, the patient is advised to consult her own physician or contact the local VD clinic or Public Health Department in her community.

Referral for Ineligibility

If a patient is determined by the physician and/or counseling/nursing staff to be ineligible for an outpatient suction curettage abortion, for either medical or emotional reasons, the counselor directs her to the clinic director for discussion about alternatives for continuing the pregnancy or terminating the pregnancy in another type of facility, whichever applies. Support and assistance are provided to make the referral as smooth as possible.

Other

Special counseling is also indicated when:

1. A patient expresses strong ambivalence about terminating her pregnancy.
2. A patient seems to have been coerced into terminating her pregnancy, her partner or a family member may be included in the counseling session.
3. A patient reports (or appears to have) a drug addiction problem or psychiatric disorder.
4. A patient reports that her pregnancy is a result of rape or incest.
5. A very young patient appears for an abortion without a parent or legal guardian.
6. A patient has had multiple previous abortions and/or denies the need for a birth control method.

Operating Room/Suction Curettage Procedure

The patient is asked to void and then is escorted to the operating room by the Operating Room Nurse. The Operating Room Nurse introduces herself, and makes the patient as relaxed and as comfortable as possible. During the procedure, the operating room nurse provides emo-

tional support for the patient and assists the physician as necessary.

1. The operating room nurse assists the patient to the procedure table, places her in lithotomy position and the perineal area is cleansed with antiseptic solution. (Betadine is used unless the patient is allergic to iodine preparations in which case Aqueous Zephiran Chloride solution 1:750 is substituted.) The patient is then draped.
2. The physician again reviews the patient's medical history and/or performs another pelvic examination to reconfirm the uterine size and position.
3. The physician scrubs while the nurse prepares the instruments, sterile gloves, lighting, etc.
4. The suction curettage procedure is performed by the physician:
    a. A bi-valve speculum is introduced into the vagina and the cervix and vagina are cleansed with the same antiseptic solution.
    b. The cervix is grasped with a single-tooth tenaculum, and the para-cervical block, with 20 cc xylocaine 1%.
    c. A uterine sound is introduced to determine the depth of the uterus. Careful dilitation of the cervix follows, until the appropriate suction vacurette can easily be introduced into the uterus.
    d. The uterus is suctioned and the physician examines the products of conception. (S)he will explore the uterine walls with a sharp curette to insure that the procedure has been completed. If necessary, the physician will order methergine or pitocin to be administered during or immediately after the procedure.
    e. After the procedure has been completed, the patient is assisted out of lithotomy position and made comfortable. A sanitary pad is applied.

f. The nurse escorts the patient to the recovery room.

g. The operating room nurse places the specimen into a container, Formalin 10% solution.

h. The operating room is prepared for the next patient.

Microscopic Tissue Examination

In some instances, the physician may request that the tissue removed from the uterus during the abortion be sent to the pathology laboratory for microscopic examination.

1. The operating room nurse strains the tissue aspirated from the uterus and places all tissue fragments (without excess blood and amniotic fluid) in a preservative solution (Formalin 10%).

2. At the end of each day, the specimen containers are taken to the lab. Any specimens that the doctor has requested a microscopic report on are sent to the pathologist.

3. The pathology laboratory sends a pathology report on requested specimens to the clinic. Abnormal findings are reviewed by the Medical Director. The patient is notified of any findings which indicate the need for further study by the physician.

4. All pathology reports are filed in the patient's permanent clinic record.

Recovery Room

The responsibility of the recovery room nurse is to monitor the patient's condition during the immediate postoperative period for symptoms of complication. She offers emotional support to the patient and provides an atmosphere that is conducive to group interaction.

1. The recovery room nurse assists the patient to a recovery room and makes her comfortable.
2. The recovery room nurse checks the patient's vital signs every fifteen until stable, and observes the patient's color and bleeding pattern. The physician is notified of any unusual postoperative symptoms. A pad count is kept if bleeding seems excessive.
3. The recovery room nurse under the direction of the physician supplies the patient with a two month supply of pills, if that is the birth control method the patient has chosen. The recovery room nurse again reviews postoperative instructions and birth control methods.
4. The recovery room nurse advises the patient of any special follow-up care recommended by the physician. After a stay of 30-45 minutes in the recovery room the patient is discharged by the physician.
5. If the patient chooses to leave the recovery room against the orders of the physician, the recovery room nurse has the patient sign a form so stating and witnesses this signature of the patient.

Emergency Service

The Ladies Center, Nebraska, Inc. maintains a twenty-four hour physician's answering service and encourages patients to call collect with any questions or problems which occur postoperatively.

Calls received after clinic hours

The answering service records the patient's name and telephone number and notifies the Clinic Director who returns the patient's call immediately.

Calls received during clinic hours

The staff member receiving the telephone call records the date and time of the call, the patient's name and tele-

phone number and the symptoms she describes. She obtains the patient's chart, makes the necessary notations and gives the chart to the physician.

Follow-up

All recorded information is reviewed and any necessary follow-up is directed by the physician.

Follow-up Postoperative Examination

The Ladies Center, Nebraska, Inc. stresses the need for a postoperative physical examination to be performed approximately three weeks after the abortion procedure. Patient may also return to the clinic for routine gynecological examinations on a continuing basis.

1. If the patient returns to The Ladies Center, Nebraska, Inc. for the postoperative examination, there is no additional fee for this service. Postoperative appointments are scheduled on the day of the abortion, or the patient may telephone the clinic for an appointment.
2. On the day of her follow-up examination, the patient is examined by the physician. Birth control methods are reviewed by a nurse or the physician and a contraceptive method is prescribed by the physician.
3. If the patient prefers to see her private physician or a family planning clinic, the appropriate referral letters are sent.

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No. 80-1509

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES THONE, Governor of The State of Nebraska, *et al.*,
Appellants,

vs.

WOMENS SERVICES, P.C., *et al.*,
Appellees,

CHARLES THONE, Governor of The State of Nebraska, *et al.*,
Appellants,

vs.

LADIES CENTER, NEBRASKA, INC., *et al.*,
Appellees,

CHARLES THONE, Governor of The State of Nebraska, *et al.*,
Appellants,

vs.

WOMENS SERVICES, P.C., *et al.*,
Appellees.

On Appeal from The United States Court of Appeals
for the Eighth Judicial Circuit

MOTION AND BRIEF OF APPELLEES, WOMENS SERVICES, P.C., AND G. WILLIAM ORR, M.D., TO DISMISS APPELLANTS' "JURISDICTIONAL STATEMENT" AND TO AFFIRM THE JUDGMENTS BELOW

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TABLE OF CONTENTS

Page

Motion of Appellees, Womens Services, P.C., and G. William Orr, M.D., to Dismiss Appellants' "Jurisdictional Statement" and to Affirm the Judgments Below 1

Brief of Appellees, Womens Services, P.C., and G. William Orr, M.D., in Support of their Motion to Dismiss Appellants' "Jurisdictional Statement" and to Affirm the Judgments Below 3

Argument

I Failure to raise a substantial question as to the appropriate standard of review 4

II The District Court correctly found that a 48 hour mandated delay created an "undue burden" on abortion services 5

III The District Court correctly found the parental notification unconstitutional 7

IV The issue of corporate standing is inapplicable to these appellees 8

V Abstention was inappropriate 9

Conclusion 10

TABLE OF AUTHORITIES

Cases

Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F.Supp. 1172 (N.D.Ohio 1979), *appeal pending* 4,5,6

Baird v. Department of Public Health of the Commonwealth of Massachusetts, 599 F.2d 1098 (1st Cir. 1979) 4

Bellotti v. Baird, 443 U.S. 662 (1979) 7

Charles v. Carey, ____ F.Supp. ____ (N.D.Ill., Nos. 79-C-4541 and 79-C-4558, Nov. 16, 1979) 4,5

Charles v. Carey, 627 F.2d 772 (7th Cir. 1980) 4,5,6

Doe v. Bolton, 410 U.S. 179 (1973) 4

H.L. v. Matheson, ____ U.S. ____ (1981), 49 L.W. 4255 (Mar. 23, 1981) 7

Leigh v. Olson, 497 F.Supp. 1340 (D.N.D. 1980) 6

Mahoning Women's Center v. Hunter, 610 F.2d 456 (6th Cir. 1979), *vacated and remanded on other grounds,* ____ U.S. ____ (1980), 65 L.Ed.2d 1110 . 4,6

Margaret S. v. Edwards, 488 F.Supp. 181 (E.D.La. 1980) 6

Planned Parenthood v. Blanton, ____ F.Supp. ____ (N.D.Tenn., No. 78-2310, Aug. 31, 1979) 4,5

Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft, 483 F.Supp. 679 (W.D.Mo. 1980), *appeal pending* 6

Planned Parenthood League of Massachusetts v. Bellotti, ____ F.2d ____ (1st Cir., No. 80-1580, Feb. 9, 1981) 6

Planned Parenthood of Memphis v. Alexander, ____ F. Supp. ____ (W.D.Tenn., No. 78-2310, Mar. 23, 1981) 5,6

Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975), *affirmed*, 428 U.S. 901 (1976) 4

Reproductive Health Services v. Freeman, 614 F.2d 585 (8th Cir. 1980), *vacated and remanded on other grounds*, ____ U.S. ____ (1980), 66 L.Ed.2d 13 ... 4

Roe v. Wade, 410 U.S. 113 (1973) 4

Wolfe v. Stumbo, ____ F.Supp. ____ (W.D.Ky., No. C80-0285L(A), Dec. 3, 1980 6

Women's Community Health Center, Inc. v. Cohen, 477 F.Supp. 542 (D.Me. 1979) 6

Womens Services, P.C. v. Thone, 483 F.Supp. 1022 (D.Neb. 1979), *affirmed*, 636 F.2d 207 (8th Cir. 1980), *appeal pending* 2,5

Statutes

Nebraska Statutes, §28-326(8) 9

Nebraska Statutes, §28-333 7,8

Nebraska Statutes, §28-343 9

Utah Statutes, §76-7-304 7

No. 80-1509

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES THONE, Governor of The State of Nebraska, *et al.*,
Appellants,

vs.

WOMENS SERVICES, P.C., *et al.*,
Appellees,

CHARLES THONE, Governor of The State of Nebraska, *et al.*,
Appellants,

vs.

LADIES CENTER, NEBRASKA, INC., *et al.*,
Appellees,

CHARLES THONE, Governor of The State of Nebraska, *et al.*,
Appellants,

vs.

WOMENS SERVICES, P.C., *et al.*,
Appellees.

On Appeal from The United States Court of Appeals
for the Eighth Judicial Circuit

MOTION OF APPELLEES, WOMENS SERVICES, P.C., AND G. WILLIAM ORR, M.D., TO DISMISS APPELLANTS' "JURISDICTIONAL STATEMENT" AND TO AFFIRM THE JUDGMENTS BELOW

Come now Appellees, Womens Services, P.C., and G. William Orr, M.D., and pursuant to Rule 16.1(a) of this Honorable Court move to dismiss the "Jurisdictional Statement", heretofore filed by Appellants for failure to conform to Rule 33.2(a)(4) of this Honorable Court.

Come now Appellees, Womens Services, P.C., and G. William Orr, M.D., and pursuant to Rule 16.1(c) and (d) of this Honorable Court move to affirm the PER CURIAM decision of December 8, 1980, as unanimously rendered by the United States Court of Appeals for the Eighth Judicial Circuit in Appeal Nos. 80-1192 and 80-1193, reported at 636 F.2d 207 (8th Cir. 1980), the Honorable Donald R. Ross, Circuit Judge, Floyd R. Gibson, Senior Circuit Judge and Howard F. Sachs, District Judge (sitting by designation), presiding.

Said named Appellees move to affirm on the grounds that it is manifest that the federal questions raised by Appellants are so unsubstantial as to need no further argument nor adjudication; on the grounds that the judgments below rest upon adequate non-federal bases; and on the grounds that said federal questions, even if substantial, have been expressly, repeatedly, wisely and convincingly decided by other Circuit Courts of Appeals and by other District Courts in a manner wholly consistent with the opinions below.

WHEREFORE, said named Appellees pray this Honorable Court to dismiss Appellants' "Jurisdictional Statement" and to affirm the decision herein appealed.

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On Appeal from The United States Court of Appeals
for the Eighth Judicial Circuit

BRIEF OF APPELLEES, WOMENS SERVICES, P.C., AND G. WILLIAM ORR, M.D., IN SUPPORT OF THEIR MOTION TO DISMISS APPELLANTS' "JURISDICTIONAL STATEMENT" AND TO AFFIRM THE JUDGMENTS BELOW

ARGUMENT

I

This Appeal Fails To Raise Any Question As To The Appropriate Legal Standard Of Review Under The Federal Constitution Of Statutes Regulating The Performance Of Abortions.

The appropriate legal standard for constitutional review of abortion regulation has been clearly established by this Honorable Court in *Roe* v. *Wade,* 410 U.S. 113 (1973) and *Doe* v. *Bolton,* 410 U.S. 179 (1973) and their progeny.

The various Circuits have been uniformly consistent in the interpretation and application of such standards. See: *Baird* v. *Department of Public Health of The Commonwealth of Massachusetts,* 599 F.2d 1098, 1102 (1st Cir. 1979); *Poe* v. *Gerstein,* 517 F.2d 787, 791 (5th Cir. 1975), *affirmed,* 428 U.S. 901 (1976); *Mahoning Women's Center* v. *Hunter,* 610 F.2d 456, 459 (6th Cir. 1979), *vacated and remanded on other grounds,* ____ U.S. ____ (1980), 65 L.Ed.2d 1110; *Charles* v. *Carey,* 627 F.2d 772, 777 (7th Cir. 1980); *Reproductive Health Services* v. *Freeman,* 614 F.2d 585, 594 (8th Cir. 1980), *vacated and remanded on other grounds,* ____ U.S. ____ (1980), 66 L.Ed.2d 13.

Appellants ardently seek to create waves from still waters. In support, Appellants cite three cases: *Akron Center for Reproductive Health, Inc.* v. *City of Akron,* 479 F.Supp. 1172 (N.D.Ohio 1979); *Charles* v. *Carey,* ____ F.Supp. ____ (N.D.Ill., Nos. 79-C-4541 and 79-C-4558, Slip Opinion, Nov. 16, 1979); And, *Planned Parenthood* v. *Blanton,* ____ F.Supp. ____ (N.D. Tenn., No. 78-2310, Slip Opinion, Aug. 31, 1979). All three cases are clearly inapplicable.

(a) The "rational" standard adopted by the District Court in *Akron, supra,* has been implicitly reputed by the later Sixth Circuit opinion in *Mahoning Women's Center, supra,* and expressly

referred to and rejected by the Seventh Circuit in *Charles, supra,* 627 F.2d 772, 778 at n.6.

(b) The District Court opinion in *Charles, supra,* does not support the interpretation given to it by Appellants. (See Slip Opinion at 25). In addition, there exists no ambiguity within the Seventh Circuit's opinion in *Charles, supra,* as to the appropriate standard of review. See: *Charles, supra,* 627 F.2d at 777-778.

(c) The District Court in *Planned Parenthood* v. *Blanton,* sub nom., *Planned Parenthood of Memphis* v. *Alexander,* ____ F.Supp. ____ (W.D.Tenn., No. 78-2310, Mar. 23, 1981), issued its ruling on the merits. It concludes by concurring with all other courts on this issue, save *Akron, supra.* See: Slip Opinion at 17.

Neither language quoted out of context, opinions subsequently reversed or overruled, nor Appellants' most fervent desire can create dissension or disagreement as to legal principles, which do not in fact or law exist.

II

The District Court Properly And Correctly Found That The Mandated Forty-Eight Hour Delay Created An "Undue Burden" Upon The Election And Performance Of First Trimester Abortions.

Appellants urge this Honorable Court to ignore the express, factual findings of the District Court in this regard. The District Court specifically found as matters of fact that a mandated 48 hour delay would "impose an undue burden" by reasons of "increased cost", "one additional trip", "stay in Omaha the duration of the waiting period" and "increase in risk to the pregnant woman's health". 483 F.Supp. at 1050.

Appellants blithely choose to ignore the sound reasoning and clear language of the District Court and to rely upon their own tortured interpretations and fallacious non-sequitors. The real crux of Appellants' position is found in their unsupportable plea that any regulations that "are reasonable and related to the legitimate state interest of protecting the decision making process" be permitted. (Jur. State. at 16). This Honorable Court has never recognized such a legitimate state interest during the first trimester. The phrophetic wisdom of this High Court in insulating early pregnancies and sound medical practice from the vicissitudes of legislative interference has proven correct. It would be myopic to ignore the legion of federal court decisions which, while faithfully tracking this Honorable Court's decisions, have consistently voided such legislative intrusions.

The courts have repeatedly voided such mandated delays imposed under all circumstances; thereby allowing physicians the freedom to alter the practice of medicine to fit the differing health exigencies of each patient. See: *Charles, supra,* 627 F.2d at 785-786; *Planned Parenthood Association of Kansas City, Missouri, Inc.* v. *Ashcroft,* 483 F.Supp. 679, 696 (W.D.Mo. 1980); *Wolfe* v. *Stumbo,* ____ F.Supp. ____ (W.D. Ky., No. C80-0285L(A), Dec. 3, 1980); *Planned Parenthood of Memphis* v. *Alexander,* ____ F.Supp. ____ (W.D.Tenn., No. 78-2310, Mar. 23, 1981); *Leigh* v. *Olson,* 497 F.Supp. 1340, 1347-1348 (D.N.D. 1980); *Margaret S.* v. *Edwards,* 488 F.Supp. 181, 212-213 (E.D.La. 1980); *Planned Parenthood League of Massachusetts* v. *Bellotti,* ____ F.2d ____ (1st Cir., No. 80-1580, Feb. 9, 1981); And, *Women's Community Health Center, Inc.* v. *Cohen,* 477 F.Supp. 542, 550-551 (D.Me. 1979), among others. The sole exception is *Akron Center for Reproductive Health, Inc.* v. *City of Akron,* 478 F.Supp. 1172 (N.D.Ohio 1979), *appeal pending,* which as noted *supra* has been implicitly overruled in its own Circuit by *Mahoning Women's Center* v. *Hunter,* 610 F.2d 456, 460 (6th Cir. 1979) and expressly rejected by the Seventh Circuit in *Charles* v. *Carey,* 627 F.2d 772, 778 at n.6. (7th Cir. 1980).

III

The District Court Properly And Correctly Found That The Mandated Notice Requirement By A Minor To Her Parent For Abortion "* * * Poses An Absolute Obstacle Which Might, In Some Instances, Unduly Burden A Minor's Constitutional Right To Procure An Abortion". ("Memorandum And Order On Motion To Intervene, Motion For Reconsideration And Motions For Summary Judgment", August 1, 1979, Appendix B at 55).

Appellants in one short paragraph beguilingly suggest that this entire issue is controlled in all respects by *H.L.* v. *Matheson,* ____ U.S. ____ (1981), 49 L.W. 4255 (March 23, 1981). Appellees herein respectfully suggest otherwise.

Initially, it should be noted that in the District Court Appellants conceded and agreed to be bound on this issue solely by this Honorable Court's opinion in *Bellotti* v. *Baird,* 443 U.S. 662 (1979). "The defendants in their letter to the court dated July 20, 1979, agreed that the parental consultation issue is controlled by the *Bellotti* case." "Memorandum And Order On Motion To Intervene, Motion For Reconsideration And Motions For Summary Judgment", August 1, 1979, Appendix B at 57.

Secondly and more importantly, The Nebraska Statute in this cause (§28-333 [Appendix E at 78-79]) is markedly and significantly different than the Utah statute in *H.L., supra,* (§76-7-304 [49 L.W. at 4256]).

The Utah statute's excepting language of "(n)otify, if possible" was held by the Utah Supreme Court and accepted by this Honorable Court to mean "that the physician is required to notify parents 'if under the circumstances, in the exercise of reasonable diligence, he can ascertain their identity and location and it is feasible or practicable to give them notification.' " *H.L., supra,* 49 L.W. at 4257.

The Nebraska statute under consideration here arbitrarily and uniformly provides "(n)o abortion shall be performed on any minor without * * * a written statement by her indicating that she has consulted with her parent." Section 28-333, Appendix E at 78-79. No exception whatever is made for the minor who can not under the then attendant circumstances, in the exercise of reasonable diligence, either ascertain the identity of her parent or guardian, ascertain the location of her parent or guardian, or who for a myriad of other forseeable situations can neither feasibly nor practicably give such notice.

The minor in Nebraska, unable to give such notification by reason of physical circumstances beyond her making or control, must experience a pregnancy constituting a medical emergency, with its concomitant life-threatening risks to her, before she can obtain an abortion without such unobtainable parental notification, if, at all. The preceding is the only scenario under which a minor in Nebraska can obtain an abortion when *unable* to notify her parent. In this critical regard, the Utah statute approved by this Honorable Court in *H. L., supra,* stands light years apart from the Nebraska statute voided by Chief Judge Urbom and by the Eighth Circuit below.

The Nebraska requirement does permit "parents * * * veto power over the minor's abortion decision" by their unavailability for notice and ignores the fact that "time is likely to be of the essence in an abortion decision"; two critical matters addressed by this Honorable Court in *H. L., supra.* 49 L.W. at 4258-4259.

IV

Appellants Argument As To The Issue Of Corporate Standing Is Applicable Only To Appellee, Ladies Center, Nebraska, Inc., And, Accordingly, Appellees Herein Make No Reply.

V

The District Court Properly And Correctly Found That Abstention As To §28-326(8) Of Nebraska Revised Statutes Was Inappropriate.

Appellants' position in this regard is not well-taken and their statement that "Judge Urbom agreed that 'the proposed construction [defendants'] of the informed consent provision would significantly affect the nature of the constitutional questions involved.' " (Jur.State. at 20) is grossly misleading. The words of Judge Urbom concluding the sentence and immediately following the words quoted by Appellants are that "* * * I do not agree that the state statute is susceptible of the suggested construction." (Appendix C at 63). As Judge Urbom aptly noted,

> "Because the construction offered by the defendants would strain a plain reading of the provisions in question, I conclude that the provisions are not susceptible of this construction in order to warrant deference to the state courts under the abstention doctrine. * * * Criminal proceedings are an exceedingly severe means of testing out what appears to be a highly improbable construction of a statute, and no person should be subjected to that risk." Appendix C at 64.

Appellants seek to raise for the first time before this Honorable Court an abstention argument as to §28-343, as well. (Jur.State. at 20). This issue was never raised below.

CONCLUSION

This cause and the issues herein contained do not warrant plenary review by this Honorable Court. The judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed forthwith.

Respectfully submitted,

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